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In the Supreme Court of the United States

OCTOBER TERM, 1992

SIDNEY P. COOPER, SERGEANT FIRST CLASS,
UNITED STATES ARMY,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

Petition For A Writ Of Certiorari To The United States Court Of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER PETITIONER WAS ENTRAPPED WHEN GOVERNMENT LAW ENFORCEMENT AGENTS MADE REPEATED SOLICITATIONS TO COMMIT DRUG OFFENSES, KNOWING THAT PETITIONER WAS SUCCESSFULLY UNDERGOING TREATMENT IN A FEDERAL DRUG TREATMENT PROGRAM, AND PETITIONER WAS NOT OTHERWISE PREDISPOSED TO COMMIT THE OFFENSES INDEPENDENT OF THE GOVERNMENT'S ACTIONS.

II

WHETHER THE DRUG ABUSE PREVENTION, TREATMENT, AND REHABILITATION ACT, 21 U.S.C. §§ 1101 *et seq.*, AS IMPLEMENTED IN 42 C.F.R. §§ 2.17 *et seq.* AND DEPARTMENT OF THE ARMY REGULATION 600-85, PROHIBITS UNDERCOVER LAW ENFORCEMENT STING OPERATIONS AGAINST DRUG REHABILITATION PATIENTS ABSENT ANY EVIDENCE OF ILLEGAL PATIENT ACTIVITY.

III

WHETHER PETITIONER WAS DENIED HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW AS A RESULT OF OUTRAGEOUS GOVERNMENT CONDUCT, WHERE LAW ENFORCEMENT AGENTS INTENTIONALLY VIOLATED 42 C.F.R. §§ 2.17 *et seq.* AND CORRESPONDING ARMY REGULATIONS, AND A CRIMINAL INFORMANT WHO, UPON BEING OFFERED SEVERAL INDUCEMENTS BY LAW ENFORCEMENT AGENTS, KNOWINGLY PROVIDED FALSE INFORMATION AGAINST PETITIONER IN ORDER TO MEET AN ARBITRARY QUOTA.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Sidney P. Cooper, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals, *on reconsideration,* is reported at 35 M.J. 417 (C.M.A. 1992) (Appendix A). That court's initial opinion is reported at 33 M.J. 356 (C.M.A. 1991) (Appendix B). The opinion of the Army Court of Military Review is unpublished. *See United States v. Cooper,* CM 8902034 (A.C.M.R. 5 November 1990) (unpub.) (Appendix C).

JURISDICTION

The decision of the Court of Military Appeals, *on reconsideration,* was rendered on September 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. 1992).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U.S.C. §§ 1101 and 1102 (1982) provides:

> **§ 1101. Congressional findings.**
>
> The Congress makes the following findings:
>
> (1) Drug abuse is rapidly increasing in the United States and now afflicts urban, suburban, and rural areas of the Nation.
>
> (2) Drug abuse seriously impairs individual, as well as societal, health and well-being.
>
> (3) Drug abuse, especially heroin addition, substantially contributes to crime.
>
> (4) The adverse impact of drug abuse inflicts increasing pain and hardship on individuals, families, and communities and undermines our institutions.
>
> (5) Too little is known about drug abuse, especially the causes, and ways to treat and prevent drug abuse.

(6) The success of Federal drug abuse programs and activities requires a recognition that eduction, treatment, rehabilitation, research, training, and law enforcement efforts are interrelated.

(7) The effectiveness of efforts by State and local governments and by the Federal Government to control and treat drug abuse in the United States has been hampered by a lack of coordination among the States, between States and localities, among the Federal Government, States and localities, and throughout the Federal establishment.

(8) Control of drug abuse requires the development of a comprehensive, coordinated long-term Federal strategy that encompasses both effective law enforcement against illegal drug traffic and effective health programs to rehabilitate victims of drug abuse.

(9) The increasing rate of drug abuse constitutes a serious and continuing threat to national health and welfare, requiring an immediate and effective response on the part of the Federal Government.

(10) Although the Congress observed a significant apparent reduction in the rate of increase of drug abuse during the three-year period subsequent to the date of enactment of this Act [enacted Mar. 21, 1972] and in certain areas of the country apparent temporary reductions in its incidence, the increase and spread of heroin consumption since 1974, and the continuing abuse of other dangerous drugs, clearly indicate the need for effective, ongoing, and highly visible Federal

leadership in the formation and execution of a comprehensive, coordinated drug abuse policy.

(11) Shifts in the usage of various drugs and in the Nation's demographic composition require a Federal strategy to adjust the focus of drug abuse programs to meet new needs and priorities on a cost-effective basis.

(12) The growing extent of drug abuse indicates an urgent need for prevention and intervention programs designed to reach the general population and members of high risk populations such as youth, women, and the elderly.

(13) Effective control of drug abuse requires high-level coordination of Federal international and domestic activities relating to both supply of, and demand for, commonly abused drugs.

(14) Local governments with high concentrations of drug abuse should be actively involved in the planning and coordination of efforts to combat drug abuse.

§ 1102. Congressional declaration of national policy.

The Congress declares that it is the policy of the United States and the purpose of this Act to focus the comprehensive resources of the Federal Government and bring them to bear on drug abuse with the objective of significantly reducing the incidence, as well as the social and personal costs, of drug abuse in the United States, and to develop and assure the implementation of a comprehensive, coordinated long-term Federal strategy to combat drug abuse. To reach these goals, the Congress further declares that it is the policy of the United States and the purpose of this Act to meet the problems of drug abuse through—

(1) comprehensive Federal, State, and local planning for, and effective use of, Federal assistance to States and to community-based programs to meet the urgent needs of special populations, in coordination with all other governmental and nongovernmental sources of assistance;

(2) the development and support of community-based prevention programs;

(3) the development and encouragement of effective occupational prevention and treatment programs within the Government and in cooperation with the private sector; and

(4) increased Federal commitment to research into the behavioral and biomedical etiology of, the treatment of, and the mental and physical health and social and economic consequences of, drug abuse.

The Federal regulations which implement the Drug Abuse Prevention, Treatment, and Rehabilitation Act are codified at 42 CFR §§ 2.1-2.67 (10-1-91 Edition), and provide in pertinent part:

§ 2.17 Undercover agents and informants.

(a) Restrictions on placement.

Except as specifically authorized by a court order granted under § 2.67 of these regulations, no program may knowingly employ, or enroll as a patient, any undercover agent or informant.

(b) Restriction on use of information.

No information obtained by an undercover agent or informant, whether or not that undercover agent or informant is placed in a program pursuant to an authorizing court order, may be used to criminally investigate or prosecute any patient.

§ 2.67 Orders authorizing the use of undercover agents and informants to criminally investigate employees or agents of a program.

(a) Application. A court order authorizing the placement of an undercover agent or informant in a program as an employee or patient may be applied for by any law enforcement or prosecutorial agency which has reason to believe that employees or agents of the program are engaged in criminal misconduct.

* * *

(e) Limitation on use of information. No information obtained by an undercover agent or informant placed under this section may be used to criminally investigate or prosecute any patient or as the basis for an application for an order under § 2.65 of these regulations.

Army Regulation 600-85 [hereinafter AR 600-85], Personnel General: Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 1988) [hereinafter ADAPCP], paras. 2.16 a & b, implements the Drug Abuse Prevention, Treatment, and Rehabilitation Act and its corresponding regulations, and provides in pertinent part:

2.16. Law enforcement relationship to the ADAPCP.

a. It is Army policy to encourage voluntary entry into the ADAPCP. Military police, Criminal Investigation Division (CID) special agents, and other investigative personnel will not solicit information from clients in the program, unless they volunteer to provide information and assistance. If the client volunteers, the information will not be obtained in the CCC [Community Counseling Center] or in such a manner as to jeopardize the safety of sources of the information or compromise the confidentiality and credibility of the ADAPCP (AR 190-30 and 195-2).

> **b.** Title 42, Code of Federal Regulations, prohibits undercover agents from enrolling in or otherwise infiltrating an alcohol or other drug treatment or rehabilitation program for the purpose of law enforcement activities . . .

Army Regulation 195-2 [hereinafter AR 195-2], Criminal Investigation: Criminal Investigation Activities (30 Oct. 1985), para. 3-7 implements corresponding restrictions on law enforcement personnel when investigating drug rehabilitation patients, and provides:

> **3.7. Army Alcohol and Drug Abuse Prevention and Control Program (ADAPCP).**
>
> In compliance with the Army's ADAPCP policy, CID will investigate participants in ADAPCP for controlled substance offenses only if the offense occurred after entry into the program or if the participant had been identified as a suspect or subject prior to the time of entry into the program. Participants in ADAPCP will not be knowingly approached by CID special agents for the purpose of soliciting information about controlled substances distribution unless the participant voluntarily offers to provide such information (See AR 600-85).

Criminal Investigation Division Regulation 195-15 [hereinafter CIDR 195-15], Criminal Investigation: USACIDC Source Program (1 Nov. 1987), paras. 1-2d & 2-5b(5) define a "registered source" agent and further implement the law enforcement limitations discussed in AR 600-85 and AR 195-2, respectively, and provide:

> **1.2 d. [Definition of] Registered Source**—An individual, recruited, targeted and/or controlled by a special agent to confidentially gather intelligence information for USACIDC personnel. Registered sources are always considered agents of the Government and their identity will be protected.

2-5b(5). The Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) prohibitions and restrictions are defined in AR 600-85. USACIDC special agents and other investigative personnel, to include sources, will not solicit information from participants in ADAPCP. Information which is volunteered is acceptable, as long as it is not obtained within an ADAPCP facility or in such a manner as to jeopardize the safety of the source or in a way which compromises the credibility of the ADAPCP. No covert agents will enroll or infiltrate ADAPCP facilities for the purpose of law enforcement activities. The USACIDC special agent must know if their open/confidential/registered source(s) are ADAPCP participants.

STATEMENT OF THE CASE

On March 10, 1989 and May 30-31, 1989, petitioner was tried at Fort McNair, Washington, D.C., before a general court-martial composed of officer and enlisted members [hereinafter the "jury"].[1] Contrary to his pleas, petitioner was found guilty of two distributions of cocaine, in violation of Uniform Code of Military Justice art. 112a, 10 U.S.C. § 912a (1982 & Supp. V 1987) [hereinafter UCMJ]. The jury sentenced petitioner to a dishonorable discharge and confinement for 5 years.

In early December, 1988, a friend and former Army military policeman, Rodney Powell, twice enticed petitioner to obtain cocaine and distribute the drug to Specialist Michael Duperron, a rookie agent with the U.S. Army Criminal Investigation Division Command [hereinafter

[1] Court-martial members are analogous to jurors.

CID].[2] *See* Record of Trial [hereinafter R.] 112, 120-21, 216-17, 222, 230-35, 239-40, 363-69; Prosecution Exhibit 1. Petitioner first met Powell in the Nassif Building, Falls Church, Virginia where they both worked. Petitioner was a legal clerk at the United States Army Legal Services Agency, and Powell, then serving on active-duty with the Army, was the driver for Major General Cromartie, the commander of CID. *See* R. 201-04; 344. As time passed, petitioner and Powell developed a shared addiction to crack cocaine.[3] Their drug addictions worsened, and remarkably, each survived their own personal tragedies, which are chronicled in the Court of Military Appeals' initial opinion. *See* Appendix B at 2b nn.2 & 3; *See also,* R. 202-16, 222 (Powell); R. 247-56, 270-75, 286-88, 343-44, 349-62 (petitioner).

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[2] Powell served as an Army military policeman from 5 May 1985 to 1 March 1988, and was discharged under Honorable conditions upon completion of his enlistment. *See* R. 200-02. At the time petitioner was targeted by CID as a potential drug source, Powell was working for CID as a paid civilian undercover informant. *See* R. 110, 127, 163-65; Defense Exhibits C & D for Identification (payment vouchers).

[3] Crack cocaine is a dangerously addictive form of cocaine. The user experiences a euphoric "rush" that lasts for several minutes, followed by a "high" that continues for up to an hour. G. Uelmen & V. Haddox, Drug Abuse and the Law Sourcebook 2-60, 2-62.1 (1988). Petitioner described the effect as follows:

> It—it's—it's hard to explain. If you take every Christmas, every Fourth of July, every New Year's, every orgasm that you've ever [ ] had in your entire life and multiply it several thousand times and then cram it into your body in an instant, that was [the] pleasure of cocaine—crack cocaine.

(R. 351). Powell testified: "Well, for myself—I can only speak for myself. It was—it's a type of a drug that you'll do anything for, you know. I've taken from my parents, friends, from anybody I could when I didn't have the resources myself. I'd do anything to get it" (R. 204-05).

Petitioner sought local treatment in the ADAPCP program, which was an unsuccessful six-month struggle. He attended ninety-seven drug counseling sessions before being referred by his counselor to an in-patient drug treatment center at Miramar Naval Air Station, near San Diego, California. After six weeks of intensive in-patient treatment at Miramar, petitioner returned to his duty assignment at the Nassif building and continued his local treatment on an out-patient basis. Petitioner was positive (indicating drug use) on ten drug tests prior to the Navy treatment. At Miramar, petitioner was tested for drugs at least twice every week during the six-week program. Petitioner was subject to automatic dismissal from the Miramar program upon one positive drug test. After successfully completing the Miramar treatment program and returning to duty on November 15, 1988, petitioner tested negative (indicating no drug use) on all eleven drug tests administered pursuant to the local treatment program.[4] Petitioner took an active role in the local program by counseling other addicts and bringing people to drug-counseling meetings. Officials working in the local treatment program documented petitioner as having attended a total of 182 narcotics anonymous meetings. *See* R. 248, 251-55, 288, 313-16.

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[4] The opening paragraph in Judge Crawford's summary of the facts contains several inaccuracies concerning petitioner's treatment history. The six months of local out-patient treatment occurred *before* the Miramar treatment, not after, and petitioner was referred to the Miramar program by his counselor rather than by a self-referral. Petitioner returned from Miramar on 15 November 1988, and continued local treatment for approximately two weeks when he was first approached by Powell on 1 December 1988, rather than after six months. *See* Appendix A at 2a; R. 248-53.

Powell, on the other hand, left the Army and continued his addiction. He soon found himself unemployed and penniless, and, at some point, was arrested for stealing his girlfriend's television set at Fort Myer, Virginia, which he pawned to get money for cocaine. As a result, Powell was pending criminal charges in Federal magistrate's court for the theft of the television. In desperation, Powell submitted reenlistment papers to Army recruiters, in which he lied about past drug use and whether he had ever been criminally charged or arrested. Powell was told by recruiters he would have to enter active duty as a military policeman, and after Powell's reenlistment had been approved, he was given a reporting date and location. The military police investigators who were handling Powell's charges for the television theft learned of his reenlistment, and informed CID. Agent Duperron of CID told the Army recruiters that Powell was pending criminal charges, and Powell's reenlistment was then blocked. Powell was later notified that if he wanted to get back into the Army he needed to contact agent Mike Duperron of CID. *See* R. 109-10, 127, 147-52, 205-10, 365-66.

Agent Duperron, a new member of CID's drug suppression team, upon learning of Powell's arrest for theft and his desire to reenter the Army, set up a meeting with Powell in an effort to hire him as an undercover CID registered source for a drug investigation within the Nassif Building. *See* R. 109-10, 132, 156-58, 208-09. Major General Cromartie, the CID commander, became aware of a drug problem in the Nassif building, where CID headquarters is located. Eradicating the Nassif building drug problem received special emphasis in CID headquarters. *See* R. 156-58, 161, 211. In furtherance of that effort, agent Duperron offered Powell several inducements for his assistance as an undercover registered source.

Agent Duperron insisted, "we did not make no promises" to Powell in return for his assistance. However, knowing that Powell was pending charges for theft of a television set and that Powell had been involved in drug trafficking and drug use, agent Duperron told Powell as "leverage" that CID would do everything they could to get him back into the Army as a military policeman. *See* R. 110, 147-48, 152-53, 156, 160, 208-09. Agent Duperron also told Powell that CID would do what they could to get his theft charges dismissed, which ultimately occurred. *Id.* Agent Duperron denied any efforts to get Powell's theft charges dismissed, but in Duperron's case file, his own notes revealed that he actively lobbied the Army and magistrate court prosecution attorneys for dismissal of Powell's charges, and for a letter to recruiting officials confirming the same so the recruiters could complete Powell's reenlistment process. *See* R. 152-53, 160-62; Defense Exhibit B for identification. Other inducements for Powell included monetary "bonuses" for his efforts in arranging drug distributions, one of which was paid on the date of petitioner's first cocaine distribution. *See* n.2 *supra.*[5]

Powell was convinced he should strike a bargain with CID. On November 30, 1988 he entered into a written "registered source" agreement with CID, which is standard procedure when CID uses undercover informants or sources who are not otherwise full-time law enforcement agents. *See* R. 110, 158, 227. Appendix B to Powell's agreement with CID is a "Declaration of Understanding," which obligated CID as follows:

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[5] In its opinion *on reconsideration,* the Court of Military Appeals inexplicably found that: "This is not an instance of an individual expressly recruited and hired to work on a case," and declared Powell a "non-government informant." *See* Appendix A at 15a, 16a. The court also incorrectly found that Powell approached CID and offered his cooperation in return for reenlistment support, when the reverse is clearly true, and which is contrary to the findings in the court's initial opinion. *See,* Appendix A at 2a; Appendix B at 1b-2b, 5b n.5; R. 109-10, 127, 147-52, 205-10.

> 3. The meaning and implication of the entrapment laws will be explained to you to ensure the legality of all transactions initiated by you on behalf of this office. You are instructed that under no circumstances will you violate these laws while working for the CID.

Appendix C to the agreement is a "Declaration of Cooperation" wherein Powell promised: "While assisting the US Army [CID], I will not knowingly violate any laws or Department of Defense regulations which apply to me." *See* R. 158-60, 227; Prosecution Exhibit 8 for Identification. Powell's end of the bargain was to help CID "get [ ] five people" who were dealing drugs in the Nassif building, and CID "would squash the charges" pending against Powell. *See* R. 211-12. When Powell entered into the agreement, CID officials did not explain to him the legal ramifications of predisposition or entrapment. Powell's understanding of entrapment was to "seek out somebody and [ ] set them up." *See* R. 214-15. Agent Duperron's understanding of entrapment was "getting a person to do something that they normally wouldn't do," and, based on his understanding of the policy pursued by CID in drug distribution cases, three purchases from an individual "usually [ ] takes any question about entrapment out." *See* R. 135, 172.[6]

Even though Powell had never known petitioner to be a drug distributor, to fill his quota, Powell falsely identified petitioner as such. *See* R. 211-16, 236-39, 364. Before the CID investigation began, Powell knew of petitioner's

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[6] Agent Duperron's training to be a Drug Suppression Team agent consisted of approximately three months of on-the-job training. He received no formal classes, and was instructed to read regulations pertaining to the drug team. His prior law enforcement experience was basic training (March-July, 1987) and thirteen months of "working the roads as an MP" at Fort Myer, Virginia. *See* R. 131-35.

enrollment in the ADAPCP program and rehabilitation efforts, including petitioner's trip to San Diego. *Id.*[7] When asked how he felt about targeting petitioner while in rehabilitation, Powell testified: "I was in an active part of my addiction, I didn't care," and "I was an addict . . . my back was up against the wall, [ ] I used him and other people to get myself out of the hole." *See* R. 212, 222.

Petitioner was first approached by Powell approximately two weeks after he returned from the Navy in-patient treatment at Miramar. Powell called petitioner at work on December 1, 1988, after Powell entered into the registered source agreement with CID. Petitioner had not heard from Powell since his days as an active cocacine addict. *See* R. 363. Claiming he could no longer approach his old sources, Powell pleaded with petitioner help him get cocaine for someone. Petitioner explained that he was rehabilitated and no longer using drugs. Powell relented, but then called several more times that day and at least once the next day, entreating petitioner with increasing desperation.[8] Powell testified that he was persistent and believed he manipulated petitioner, and "basically called all day" on the first day. The next day, after a desperate call, petitioner agreed to help. *See* R. 216-17, 231-32, 364-68.[9]

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[7] In his opinion *on reconsideration*, Judge Cox stated: "The record does not even indicate that the informant knew appellant was still in rehabilitation *at the time appellant was approached.*" *See* Appendix A at 21a (emphasis in original).

[8] Powell called from CID headquarters. Agents were present during some calls, but the calls were not closely monitored. One agent noted that when Powell spoke to petitioner over the telephone, he cupped his hand over the mouthpiece and his mouth. The agent was unsure, as was agent Duperron, how many conversations actually took place and what the substance of those conversations was. *See* R. 111, 415-16, 420-21.

[9] In the initial opinion, Judge Cox described this sequence of events as "only a little prompting," and *on reconsideration,* Judge Crawford

Agent Duperron, who was Powell's primary CID source handler, initially claimed he knew nothing of petitioner's enrollment in ADAPCP before or during the investigation, prior to any drug distributions. However, during cross-examination, agent Duperron testified that he could not recall whether Powell told him of petitioner's ADAPCP participation, and Powell "could have" told him of petitioner's treatment in California. *See* R. 144-45. Agent Duperron made no effort to find out, and never told Powell at any time that regulations prohibited them from targeting patients in the ADAPCP program. In fact, even though he was the lead agent in the investigation, agent Duperron had no idea that Army and CID regulations prohibited him from targeting or soliciting information from drug rehabilitation patients. *See* R. 145-47, 186. Enroute to the first drug purchase, petitioner told agent Duperron that he was in rehabilitation, that he no longer used drugs, and that he frequently had to take urinalysis tests. Even in light of that information, before the second distribution, agent Duperron conducted no further inquiry or investigation concerning petitioner's rehabilitation efforts. *See* R. 143, 187.[10]

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found "depending on whose testimony you accept there was either a single invitation to distribute drugs or three invitations within a short period of time." Judge Crawford also suggests that all telephone calls occurred on December 2, 1988. *See* Appendix B at 6b; Appendix A at 3a, 19a, respectively. Powell testified that he called several times on December 1 and 2, 1988. *See* R. 231-32.

[10] In his initial opinion, Judge Cox adopted the trial judge's finding that:

> [t]he CID did not know that the accused was in any sort of rehabilitation program until AFTER he had been targeted as a possible source of the distribution of drugs.

This finding obviously excludes Powell as a member of CID. *See* Appendix B at 5b (emphasis in original). *On reconsideration*, Judge Cox limited agent Duperron's knowledge even further by stating:

> [t]he record makes it clear that the agent did not know appellant was in a program until the first transaction was *in progress*.

See Appendix A at 21a (emphasis in original).

Petitioner finally agreed to help Powell, and on December 2, 1988 he met Powell and agent Duperron at a 7-Eleven Parking lot near the Nassif building. Agent Duperron was driving, and petitioner rode with the two, directing them to a residence in the District. On the way, when asked about "getting high," petitioner told agent Duperron of his participation in ADAPCP and his recovery from cocaine addiction. *See* R. 143-44, 187, 371. There was also some discussion concerning drug use by petitioner in Panama five years prior.[11] At their destination, petitioner went into a residence. The occupants, who knew petitioner from his days as a heavy cocaine user, were surprised to see him and unprepared to give him cocaine. Petitioner waited with Powell and agent Duperron for two hours before cocaine finally became available. Petitioner bought the drug with $500.00 of CID funds, and turned it over to agent Duperron. *See* R. 113-18, 235-36, 370-76.

On December 5, 1988, after several more importunings and refusals, Powell again convinced petitioner to purchase more cocaine. *See* R. 120-26, 222, 239-42, 375-77. Petitioner drove agent Duperron's car the second time,[12]

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[11] It was Specialist Duperron's recollection that, on the way to the first buy, petitioner admitted selling "drugs" when he was stationed in Panama—more than five-and-a-half years earlier (R. 114-15; 125). The reliability of this recollection was greatly shaken at trial during a heated cross-examination. Powell remembered a discussion about Panama and an admission of drug use, but not of distribution (R. 218). Petitioner testified that he told Powell and agent Duperron that he was first exposed to cocaine in Panama, but denied ever selling cocaine and denied any discussion of cocaine sales (371-72). When agent Duperron later recorded this aspect of the conversation, he wrote about prior drug use, but not about distribution. *See* R. 170-71, 181; Prosecution Exhibit 7.

[12] Agent Duperron clearly stated that petitioner drove Duperron's car. Judge Crawford's summary of the facts emphasizes, incorrectly

and another purchase was made. Later, Powell had abandoned his enterprise with CID,[13] and agent Duperron attempted to arrange a third cocaine purchase with petitioner on his own, but petitioner refused. Petitioner was subsequently arrested and charged. *See* R. 128-29, 379-80.

At trial, petitioner's defense was that the Government had entrapped him. *See* R. 468-84, 491. Defense counsel moved for a ruling from the military judge that the Government's solicitation of a former drug addict who was still in treatment violated appellant's right to due process, and asked that the judge suppress the evidence or rule that petitioner was objectively entrapped as a matter of law. Alternatively, defense counsel requested a tailored entrapment instruction for the jury, focusing on the Government's conduct. The military judge recognized defense counsel's position as "the due process of the entrapment defense" and summarily denied defense counsel's motion. *See* R. 455-58.[14]

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that petitioner drove his own car. *See* R. 122; Appendix A at 4a. Neither Powell nor petitioner owned a car at the time. *See* R. 369.

[13] Judge Crawford's lead opinion *on reconsideration* states that Powell "[w]as angry at the CID agents when they would not continue to pay him to make other buys." Appendix A at 3a, n.1. Agent Duperron testified that Powell became demanding by requesting money for bits of information, and became unreliable in terms of missing CID appointments so his services were terminated. *See* R. 126-27. Powell testified that he was not angry with CID, but his father intervened after CID kept pressing for another case. Powell's father believed his son was being used by CID, and told one of the agents involved to stop calling his house and to leave Powell alone. R. 222-23.

[14] In the dissenting opinion *on reconsideration*, Judges Gierke and Wiss struggled to find where in the record it was ever argued that the charges should be dismissed or the evidence suppressed *simply* on the ground that the Government violated service directives. *See* Appendix A at 24a (emphasis in original). In prior pleadings, petitioner relied in part on this passage in the record as a preserved basis for dismissal on due process grounds.

Petitioner was convicted as charged. The Army Court of Military Review, in affirming petitioner's conviction, did not address the entrapment and due process issues presented to that court. *See* Appendix C.

The Court of Military Appeals, then a three-judge court, granted review on both issues presented to the Army Court. Judge Cox's lead opinion held there was no due process violation because the CID agent did not *knowingly* approach petitioner and involve him in drug transactions in violation of Army regulations, and, that the Government overcame petitioner's entrapment defense. Chief Judge Sullivan's concurring opinion applied *Sherman v. United States*, 356 U.S. 369 (1958) and found that the Government could not disavow its informant's knowledge, but concluded that even though civilian and military regulations prohibited information-gathering from drug rehabilitation patients, sting operations against such patients were not prohibited. Chief Judge Sullivan stated that if CID agents enticed petitioner into *using cocaine*, his judgment would be different (*citing Rochin v. California,* 342 U.S. 165 (1952); however, because petitioner's case involved distribution of drugs "ultimately to a stranger for possible profit," a sting operation was not patently outrageous conduct. Senior Judge Everett, in a vigorous dissent, also applied *Sherman* and argued the Government could not disavow its agent's knowledge that petitioner was in a drug treatment program. He also argued that the Government's conduct violated the spirit and the letter of the drug rehabilitation program concept and contravened both Army and CID regulations. *See* Appendix B.

Soon after the initial opinion, Senior Judge Everett retired from the Court of Military Appeals, and three new members were appointed to the court. A Petition for Reconsideration was granted by the new five-judge court

and, prior to re-argument, this Court decided *Jacobson v. United States*, 112 S.Ct. 1535 (1992). *On reconsideration*, a sharply divided court once again affirmed petitioner's conviction. *See* Appendix A.

Judge Crawford's lead opinion *on reconsideration* held that violation of Army regulations did not mandate dismissal without a showing of prejudice, that there was no corresponding introduction of unreliable evidence as a result of the violation, and, that corrective action by agency officials was the appropriate remedy rather than a judicial remedy. Judge Cox's concurring opinion agreed with the lead opinion's analysis, and adopted his earlier opinion that "had law enforcment authorities sought out petitioner *because he was in the program*, for the purpose of setting him up for a subsequent arrest," he would find a violation of due process. Additionally, Judge Cox stated that the informant did not know appellant was still in rehabilitation "*at the time [petitioner] was approached*" (emphasis in original). Concurring, Chief Judge Sullivan adopted his earlier opinion and agreed with the lead opinion's *Jacobson* analysis, but found the rest of the lead opinion's analysis unnecessary. The joint dissent by Judges Gierke and Wiss argued that the lead opinion omitted several legally important points, that the facts in this case parallel *Sherman*, and that regulatory violations are a basis for judicial relief. The dissent, in applying *Jacobson* and *Sherman*, held that the Government created the crime in this case and did not prove beyond a reasonable doubt that petitioner was disposed to commit criminal acts prior to first being approached by Government agents. *See* Appendix A.

REASONS FOR GRANTING THE WRIT

In affirming petitioner's conviction, the Court of Military Appeals disregarded this Court's precedent in the

law of entrapment and the long-standing principle that the Government is responsible for the knowledge and activities of its own agents. In its decisions, the Court of Military Appeals violated its own charter by finding facts which do not exist in the record. Additionally, that court omitted legally relevant facts, and made clearly erroneous conclusions regarding the evidence of record. Even though respondent properly conceded in pleadings before the Court of Military Appeals that the informant was an agent of the Government, that court nonetheless found otherwise.

Petitioner was denied due process of law through the denial of statutory and regulatory protections established by Congress, and further implemented by the Army. The Court of Military Appeals condoned blatant violations of those regulations and termed it "harmless error." Finally, that court left it to Executive or agency heads to remedy the violations. Such a naive view of how law enforcement officials will respond to the court's sanctioning of such law enforcement abuses, plus the court's reluctance to invoke a judicial remedy, completely ignores real-world practicalities. That approach leaves petitioner at the mercy of the same agency which, at the same time it was spending time, effort, and money to rehabilitate him, callously violated regulations and created a crime in order to convict him. The Army literally pulled petitioner back into the drug world from which it was trying to rehabilitate him.

The law enforcement conduct in this case was outrageous. The Government recruited a drug-addicted informant facing criminal prosecution, gave him money, and promised him help with his pending charges as well as with his pending reenlistment as a military policeman, provided he met an arbitrary quota. The Government then gave the informant a free hand to meet that quota. The informant admitted that he knew of petitioner's rehabilita-

tion efforts, and that he falsely identified petitioner as a drug distributor. He then repeatedly solicited petitioner, a law-abiding drug rehabilitation patient who was sincerely seeking treatment, to purchase drugs for a friend. Petitioner refused, but the informant persisted. Petitioner ultimately relented, and nine months of rehabilitation at great time and expense to the Government, along with petitioner's own great personal sacrifices, were wasted. Petitioner submits that in light of the Court of Military Appeals' refusal to prevent such a flagrant abuse of police power, it is incumbent upon this Court to deter what will likely be similar abuses in the future.

I. THE COURT OF MILITARY APPEALS DISREGARDED THIS COURT'S PRECEDENT ESTABLISHED IN *JACOBSON v. UNITED STATES*, 112 S.Ct. 1535 (1992), AND *SHERMAN v. UNITED STATES*, 356 U.S. 369 (1958) CONCERNING PREDISPOSITION AND GOVERNMENT ACCOUNTABILITY FOR ITS OWN AGENTS, AND BASED ITS DECISION ON FACTS NOT IN THE RECORD.

"The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime." *Sherman*, 356 U.S. at 372. Petitioner's case is a stark example of a law enforcement agency manufacturing a crime by inducing a recovering drug addict to distribute drugs and thus throw away his hard-won sobriety.

The facts of petitioner's case are almost identical to those in *Sherman*. Like Sherman, petitioner was undergoing rehabilitation for a drug problem and experiencing fragile success. He was approached by an old acquaintance with requests to obtain drugs and initially refused. Finally, after Powell's repeated entreaties, his fragile resistance was broken down. *See* R. 216-17, 231-32,

364-68; *Sherman*, 356 U.S. at 370-71. In *Sherman*, the informant was working for the Federal Bureau of Narcotics; in petitioner's case, Powell was working for CID. Both were cooperating with the Government in exchange for favorable action by law enforcement authorities. *See* R. 110, 127, 148, 152-56, 160-65, 208-09, Defense Exhibits B-D for Identification; *Sherman*, 356 U.S. at 373-74. In both cases, the informant had knowledge that the defendant was a former user of drugs but had no evidence that the defendant had ever distributed drugs. *See* R. 211-16, 236-39; *Sherman* 356 U.S. at 373. In both cases, the law enforcement agent in charge acknowledged that he did not investigate the nature of the informant's contact with the defendant. R. 143-45, 186-87; *Sherman*, 356 U.S. at 374.

In *Sherman*, this Court held the Government liable for the knowledge of the informant, 356 U.S. at 375; petitioner asks that this Court do the same in his case. *See*, Appendix B at 8b (Sullivan, C.J. concurring), 15b (Everett, S.J. dissenting); Appendix A at 23a, 28a (Gierke and Wiss, J.J. dissenting). Here, Powell was much more than a mere informant. By virtue of the contract he signed, he became an agent of CID and was obligated to follow rules and regulations governing the conduct of CID personnel. *See* Prosecution Exhibit 8 for Identification, para. 3; R. 227. The relationship Powell had with CID was much more formal than that which the informant in *Sherman* had with the Federal Bureau of Narcotics.[15] Powell's formal agreement and CID's supervision of him made him a *de facto* agent. Any other conclusion is absurd. The Court of Military Appeals ignored *Sherman*

[15] In *Sherman*, the informant cooperated with authorities in the hope that he would receive a more lenient sentence for his own narcotics conviction. *Sherman*, 356 U.S. at 374. Unlike the instant case, there was no written agreement between the informant and authorities.

and rejected petitioner's entrapment defense by finding that the Goverment had sufficient evidence of petitioner's predisposition to distribute cocaine. As both dissenting opinions point out, the court's finding is based on a twisted view of the facts and a tortured application of legal precedent.[16]

Writing the court's initial decision, Judge Cox summarily rejected petitioner's entrapment defense by making the following finding:

> The CID asked an informant to supply names of persons who might be targeted as drug dealers. The informant gave the CID appellant's name. The informant called appellant seeking his help in finding drugs for an unknown third party. *Although initially appellant indicated his reluctance to get involved*, he nevertheless jumped into the adventure with zeal and success.

Appendix B at 7b (emphasis added). Judge Cox, however, failed to note that "the informant" had no support for telling CID that petitioner was a cocaine dealer, and had to ask petitioner to obtain drugs several times. *See* R. 211-17, 222, 231-32, 236-42, 370-77.[17] Further, there

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[16] Under the provisions of the UCMJ, the Court of Military Appeals does not have the power to find facts, but must instead accept the facts as they were adduced at trial and interpreted by the service Courts of Military Review. UCMJ art. 67(c), 10 U.S.C. § 867(c) (1982) ("The Court of Military Appeals shall take action only with respect to matters of law"). *See United States v. Vanzandt*, 14 M.J. 332, 345 (C.M.A. 1982); *United States v. Lowry*, 2 M.J. 55 (C.M.A. 1976); Appendix A at 18a n.6. Only the military Courts of Review have the authority to determine facts and weigh the credibility of witnesses and evidence. *See* UCMJ art. 66 (c), 10 U.S.C. § 866(c) (1982).

[17] Chief Judge Sullivan's concurring opinion did not address the entrapment issue at all. The Chief Judge demonstrated that he knew of *Sherman's* existence when he argued that Powell should be considered an agent of CID. *See* Appendix B at 8b. However, he apparently did not see the striking parallel between *Sherman* and petitioner's case.

was absolutely no evidence that petitioner sold cocaine prior to his "adventure" with Powell and Duperron, and Judge Cox's vague finding that "there was reasonable suspicion on the part of government agents prior to the sting operation taking place" is unsupported by the facts. *See* Appendix B at 7b, n.6. Even if the Government did not need reasonable suspicion to investigate Powell's actions against petitioner, *see, e.g., United States v. Luttrell*, 923 F.2d 764 (9th Cir. 1991) (*en banc*), *cert. denied*, 112 S.Ct. 1558 (1992) and cases cited therein, at trial the Government failed to demonstrate that petitioner was predisposed to distribute cocaine prior to its investigation. *Jacobson*, 112 S.Ct. 1540. Thus, the prosecution must fail.

The court's second decision virtually ignored *Sherman* altogether, misconstrued *Jacobson*, and relied on a questionable reading of the facts.[18] Judge Crawford relied in part on the fact that petitioner had been a cocaine user. *See* Appendix A at 18a. Petitioner's prior *use* of cocaine was insufficient as a matter of law to support a finding of predisposition to *distribute* cocaine, and was not a proper factor to be considered. *Sherman*, 356 U.S. at 375. Likewise, even if petitioner "bragged about his ability to make crack from powdered cocaine,"[19] it does not impact upon his predisposition to distribute it because converting powdered cocaine into crystalline form is a prerequisite to smoking it as "crack."

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[18] Judge Crawford, writing for the court, cited *Sherman* only for the proposition that a defendant's predisposition can be proven by circumstantial evidence that the "accused [was] merely afforded [an] opportunity to commit the crime." *See* Appendix A at 18a.

[19] Petitioner disputes this "finding" as unsupported by a fair reading of the record. *See* R. 115.

Contrary to this Court's ruling in *Jacobson* that predisposition must be measured at the time the inducement commenced, 112 S.Ct. at 1540, the court below relied upon "facts" that occurred *after* Powell initiated the distribution scheme. Judge Crawford noted that petitioner accepted Powell's entreaties to obtain cocaine and requested payment for his efforts. *See* Appendix A at 5a. While this latter finding was disputed at trial, it nonetheless misses the point: by the time petitioner allegedly requested money, his will to stay drug-free and his reluctance to aid Powell had already been overborne by Powell's entreaties for help. Petitioner's actions subsequent to Powell's inducement were all part of a single course of conduct. Therefore, that there were two distributions in this case is of no particular weight because both were motivated by Powell's initial inducement. *See Sherman*, 356 U.S. at 374; *see also United States v. Beal*, 961 F.2d 1512 (10th Cir. 1992).

Petitioner's actions subsequent to Powell's approach are not probative of his predisposition to distribute drugs *before* Powell interfered. *See United States v. Skarie*, 971 F.2d 317 (9th Cir. 1992). Furthermore, petitioner's alleged single, unrequited request for money cannot fairly be considered a "profit motive" so as to be indicative of predisposition. Even petitioner's role as a conduit between his former contacts and agent Duperron suggests the lack of predisposition to sell or otherwise distribute cocaine. *See Skarie*, 971 F.2d at 321.[20]

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[20] In applying *Jacobson*, the court in *Skarie* listed "[F]ive factors [which] are relevant in determining predisposition: (1) the character of the defendant, (2) who first suggested the criminal activity, (3) whether the defendant engaged in the activity for profit, (4) whether the defendant demonstrated reluctance, and (5) the nature of the government's inducement. [ ] Of these five factors, the most important is whether the defendant demonstrated reluctance which was

Judge Crawford's reliance on the "fact" that petitioner had "used and sold cocaine in the past" is flawed in two respects.[21] First, this "fact" derived from the testimony of agent Duperron, whose knowledge of petitioner's past was derived solely from what Powell told him. Such hearsay was inadmissible to prove petitioner's predisposition. *See United States v. Webster*, 649 F.2d 346, 347 (5th Cir. 1981) (*en banc*) (hearsay inadmissible to prove predisposition). The Government had no competent evidence that petitioner had ever distributed cocaine prior to Powell's inducement. Indeed, Powell admitted that he had none at the time he contacted petitioner, and admitted that he lied to his supervising agents on that point. *See* R. 211-12, 218, 225, 236-38.

Whether petitioner admitted having sold any drugs five years earlier while stationed in Panama was disputed at trial. *See* n.11, *supra*. Regardless, this evidence would not support a finding of predisposition as a matter of law. This Court in *Sherman* stated:

> [A] nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time [the informant] approached him, *particularly when we must assume from the record he was trying to overcome the narcotics habit at the time.*

356 U.S. at 375-76 (emphasis added).

As a matter of law, the Government failed to meet its burden of proving beyond a reasonable doubt that appel-

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overcome by the government's inducement." 971 F.2d at 320. As in *Skarie*, viewing the evidence in the present case in a light most favorable to the Government, petitioner submits that these factors clearly weigh in his favor.

[21] Petitioner conceded that he used cocaine in the past—that was the whole point of seeking rehabilitation through the ADAPCP program.

lant was predisposed to distribute drugs prior to Powell's overtures and its follow-up investigation. This failure was fatal to its case, *see Jacobson* at 1540 n.2, and the lower court's creative misinterpretation of the facts cannot salvage it.

II. THE COURT OF MILITARY APPEALS REFUSED TO ENFORCE STATUTORY AND REGULATORY PROTECTIONS IMPLEMENTED PURSUANT TO THE DRUG ABUSE PREVENTION, TREATMENT, AND REHABILITATION ACT BY CONDONING AN UNDERCOVER STING OPERATION AGAINST A LAW-ABIDING DRUG REHABILITATION PATIENT, BY ADOPTING A "HARMLESS ERROR" ANALYSIS FOR VIOLATIONS OF THE ACT, AND BY DEFERRING TO A PURPORTED AGENCY REMEDY INSTEAD OF INVOKING A JUDICIAL REMEDY.

Both decisions by the Court of Military Appeals not only refuse to enforce the statutory and regulatory protections implemented pursuant to the Drug Abuse Prevention, Treatment, and Rehabilitation Act, but the decisions also render those protections meaningless in the Armed Forces. In 21 U.S.C. §§ 1101 and 1102, Congress made specific findings concerning the need for an effective national strategy to combat drug trafficking and abuse, and to promote rehabilitation efforts. The findings and declarations by Congress recognize that prevention and treatment efforts are interrelated. Congress specifically recognized a conflict between the short-term aims of law enforcment personnel and an effective rehabilitation effort. For good reason, the Government has chosen, through its statutory and regulatory protections, not to lure recovering addicts back to drug-related crime. Not only are such efforts a waste of resources, but they defeat the laudatory effort at rehabilitation.

In response to its mandate, and in order to further protect rehabilitation efforts, Congress codified confidentiality with respect to any patient's participation in a federally-assisted drug treatment program and proscribed police intrusions into the rehabilitative process. *See* 42 U.S.C. § 290ee-3(a)-(c) (1982 & Supp. III 1985); 42 C.F.R. §§ 2.17-2.67 (10-1-91 edition). Those protections apply to the Armed Forces. *See* 42 C.F.R. § 2.12(c)(2). Accordingly, the Army has implemented appropriate protections for drug rehabilitation patients, and corresponding limits on law enforcement. *See* AR 600-85 (Army policy encourages voluntary entry into ADAPCP, and proscribes police solicitation of information from clients); AR 195-2 (law enforcement limitations; criminal investigations for patient pre-entry offenses are allowed only if patient is identified as a suspect prior to entry, *and prohibits approaching known patients for information about drug distribution*) (emphasis added); CIDR 195-15 (investigative personnel from CID, *to include sources, will not solicit information from participants in ADAPCP; registered sources are agents of the government*) (emphasis added). *See also, United States v. Hanks,* 29 M.J. 907 (A.C.M.R. 1989); *United States v. Howes*, 22 M.J. 704 (A.C.M.R. 1986) (describing the genesis and history of the Army ADAPCP program).

These statutes and regulations not only expressly make Powell and agent Duperron "agents of the government," but strictly regulate their behavior when investigating drug rehabilitation patients. The government *is* accountable for the activities and omissions of both Powell and agent Duperron according to statute, regulation, and this Court's precedent in *Sherman*. Powell and agent Duperron did not infiltrate a drug rehabilitation program *per se*, but they did knowingly and improperly approach a patient in such a program, and induced him to commit drug

offenses. Having knowledge of petitioner's patient status, the agents had a statutory duty to leave petitioner alone, unless they had evidence of a post-entry offense. In this case, the Government agents had no evidence of a post-entry offense, but nonetheless repeatedly solicited petitioner, inducing him to commit such an offense.

It is unconscionable that the agents involved *were not even aware of their own regulations* restricting investigation of drug rehabilitation patients. Additionally, the agents violated their own registered source agreement with each other by failing to explain the laws of entrapment to Powell, and by Powell's failure to comply with law and regulation while working for CID. Ignorance of the law is no excuse for an accused, but according to the Court of Military Appeals, it is, in part, an excuse for law enforcement agents.

In both decisions below, the Court of Military Appeals failed to recognize that administrative regulations issued pursuant to statutory authorization have the full force and effect of the law. *See United States v. St. Bernard Parish,* 756 F.2d 1116, 1124-25 (5th Cir. 1985), *cert. denied* 474 U.S. 1070 (1986) (analysis of the force and effect of National Flood Insurance Program regulations issued pursuant to the National Flood Insurance Act). This same principal was espoused by the Court of Military Appeals in *United States v. Graham*, 16 M.J. 460, 462 (C.M.A. 1983), where, in addressing the UCMJ art. 87 offense of "missing movement," the court said: "It is elemental that '[i]f the words used in the statute convey a clear and definite meaning a court has no right to look for or to impose a different meaning.' "

That is precisely what the Court of Military Appeals has done with its illogical "harmless error" analysis in Judge Crawford's lead opinion *on reconsideration. See* Appendix A at 10a-15a. Additionally, the court's suggestion that the

regulatory violations in petitioner's case "did not in any way affect the facts presented [or] result in [the] introduction of unreliable evidence" (*see* Appendix A at 16a), is preposterous. *All* of the facts presented at trial, and *all* of the government's evidence (albeit not totally unreliable, but certainly illegal), was a direct result of the Government's illegal conduct. But for the government agents' unlawful approach of petitioner in order to induce him to commit drug distribution offenses, there would have been no evidence, no crime, and no case.

Equally curious in Judge Crawford's lead opinion is the refusal to invoke judicial relief. Where else can petitioner turn? It is unreasonable to expect that petitioner could receive *any* remedy from those responsible for his plight, as the opinion suggests, by leaving it to the Executive or agency officials. *See* Appendix A at 16a, 20a. Previously, the Court of Military Appeals dismissed charges on due process grounds for non-criminal government violations of the same AR 600-85 involved in this case. In *United States v. Arguello*, 29 M.J. 198 (C.M.A. 1989), the same court held that the Government is bound by its own regulations, especially when it confers a right or benefits an individual. *Id.* at 203, *citing United States v. Caceras*, 440 U.S. 741, 753 (1979). In *Arguello*, the Government tried to challenge the reliability of its own urinalysis testing procedure and prosecute based on an exculpatory, negative urine sample (indicating no drug use), which was destroyed pursuant to regulation. The Court of Military Appeals reversed in part for the Government's creative, but non-criminal regulatory violation.

In petitioner's case, despite knowing and willful violations of the law by Government agents in order secure a conviction, the Court of Military Appeals refused to overturn the conviction. The exercise of judicial supervisory powers in reversing a conviction is appropriate to imple-

ment a remedy for violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validy before the jury, and, as a remedy to deter illegal conduct. *See United States v. Hasting,* 461 U.S. 499, 505 (1983). All of those concerns are present in petitioner's case.

Petitioner submits, as do the dissents in both decisions, that Chief Judge Sullivan's concurring opinions view the statutory protections in too narrow a light. The statutory and regulatory provisions do not specifically address undercover sting operations, or, for that matter, most other aspects or techniques of law enforcement. Silence, however, does not equate to acceptance. Chief Judge Sullivan takes the view that, even though the statutes and regulations prohibit information-gathering (which, under 42 C.F.R. § 2.67, still requires a court order based on a strong showing of necessity), a more intrusive undercover sting operation is permitted. The two approaches are incompatible. A fair reading of the statutes and regulations reveals that, with few exceptions, covert activitives are prohibited and those exceptions require a court order.

Under the regulatory scheme, approaching known patients—overtly or covertly, even just for information—is forbidden, and patients who have not caught law enforcement's eye by the time they enter the program are immune from any law enforcement contact regarding drug offenses except for post-entry crimes which are being investigated. *See* Appendix B, at 14b (Everett, S.J. dissenting). All members of the Court of Military Appeals agree that ADAPCP is not a safe harbor for those who continue illegal activity. However, with a few exceptions,

> "ADAPCP participants are to be left alone, free from any government contacts that might well frustrate the

> successful rehabilitation of the patient. Any action that might psychologically lure a flawed and vulnerable addict back into the environment he is trying to shun is morally reprehensible and legally proscribed."

Id.

Rehabilitation of a crack cocaine addict is a difficult and delicate process. A critical key to success is keeping the addict away from environs, to include personal acquaintances, related to the addict's obsession. *See* R. 245-65, 267-78 (expert testimony from drug counselor and physician). Petitioner testified, "I had severe cravings to use crack at the smallest trigger. If someone struck a match, the smell of the sulfur and the burning phosphorus would trigger my urge to use crack. My automatic teller card-everytime I looked at it it [sic] gave-it made me want to use crack" (R. 359). In this case, insofar as Rodney Powell was one of its agents, the police had reliable information that, though a former user, petitioner was not a distributor. The police also knew petitioner was in rehabilitation. Nevertheless, they proceeded with a scheme against petitioner to bring about "post-entry" crimes that would not have otherwise existed. By that action, CID violated both Army regulations and the Congressionally-sanctioned policy on rehabilitation programs. Both majority opinions failed to accurately consider and enforce those protections due petitioner, as set forth by Congress and the Army. Petitioner asks this Court, as his last resort, to enforce those statutory protections.

III. THE COURT OF MILITARY APPEALS HAS CONDONED OUTRAGEOUS LAW ENFORCEMENT CONDUCT WHICH DENIED PETITIONER DUE PROCESS OF LAW, WAS FUNDAMENTALLY UNFAIR, AND DENIED PETITIONER STATUTORY AND REGULATORY PROTECTIONS WHILE HE WAS UNDERGOING DRUG REHABILITATION.

In *United States v. Russell*, 411 U.S. 423, 431 (1973), and in *Hampton v. United States*, 425 U.S. 484, 489, this Court left open the possibility of finding situations where law enforcement conduct is so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction. This is such a case. The outrageous conduct in this case includes: extreme, coercive police overinvolvement in crime, numerous violations of statutes and regulations which confer rights and benefits on petitioner, targeting a known drug rehabilitation patient with no evidence of any "post-entry" crime, complete ignorance by law enforcement agents of their own regulations and restrictions, a registered source agreement ignored and violated by the agents involved, and, a drug-addicted informant who provided false information to his superiors in order to meet an arbitrary quota and secure a conviction, in return for money, promises of reenlistment help, and dismissal of pending criminal charges. Through this case, this Court can set some standards in what is fast becoming a confusing and conflicting area of the law known as the "outrageous conduct defense," which some courts seem to be treating as a return to objective entrapment.

A thorough history of the law surrounding dismissal based on outrageous Government conduct is found in *United States v. Mosely*, 965 F.2d 906 (10th Cir. 1992). The accused in *Mosely* approached an undercover agent posing as a drug dealer and asked to purchase marijuana.

The agent counter-offered to sell and "front" a substantial amount of cocaine. After Mosely missed a prearranged meeting, the agent had a barmaid friend of Mosely's, with whom the agent had sexual relations, call Mosely to remind him of the meeting. A transfer of money and drugs ensued and Mosely was arrested. The court in *Mosely* found no outrageous government conduct, but recognized such conduct as an actual defense. Predicating the defense on the Due Process Clause of the Fifth Amendment, the court in *Mosely* found this defense distinct from the entrapment defense because it focused on Government behavior rather than the subjective intent of the accused. The *Mosely* court found that, notwithstanding the lack of a clear holding from this Court on outrageous Government conduct, no circuit has denied the viability of such a defense, and, in fact, most of the circuits recognize its viability. *See Mosely* at 908-09 (citations omitted).

The standard for outrageous conduct articulated in *Mosely* combines numerous descriptions by this and other Courts, and holds that "[t]he challenged conduct must be shocking, outrageous, and clearly intolerable." The factors underlying most successful outrageous Government conduct defenses involved Government creation of the crime and substantial coercion. *Id.* at 910-11 (citations omitted). The inquiry essentially focuses on a totality of the circumstances in any given case. Even though it is well recognized by all courts that the Government has wide latitude in establishing undercover drug operations, to include furnishing opportunities and incentives for crime, the conduct becomes outrageous when law enforcement generates and induces reluctant defendants to commit new crime for the purpose of prosecuting it.

In *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the accused's conviction for manufacturing methamphe-

tamine was reversed when the government agents suggested that the accused establish a laboratory, and then supplied him with essential materials, equipment, a site, and technical expertise. The Court found that the government action involved "a demonstrable level of outrageousness," and, that the nature and extent of police involvement was so overreaching as to bar prosecution. In *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984), the accused's conviction for making and possessing a pipe bomb, and conspiracy to transfer and transferring the same was reversed. The court cited outrageous government conduct as an alternate ground for reversal, and stated the undercover agent's conduct was

> "not aimed at facilitating discovery of ongoing illicit dealings . . . Rather, it was aimed at creating new crimes for the sake of bringing criminal charges against [the accused], who, before being induced, was lawfully and peacefully minding his own affairs."

Id. at 1297. *See also United States v. Marshank*, 777 F.Supp. 1507 (N.D. Cal. 1991) (charges dismissed on due process and judicial supervisory grounds where government collaborated with accused's defense attorney in an effort to investigate, arrest, and prosecute accused); *United States v. Gardner*, 658 F.Supp. 1573 (W.D. Pa. 1987) (drug offenses dismissed on due process grounds when government agent induced and persuaded accused over a period of time to commit offenses, with sole motive and intention of overcoming obvious reluctance of accused); *United States v. Batres-Santolino*, 521 F.Supp. 744 (N.D. Cal. 1981) (drug offenses dismissed on due process grounds where, even though the defendants were not without culpability, they were not embarked nor about to embark on any criminal activity until the government agent put them in business of crime for the first time and

supplied all the drugs); *Krajewski v. State*, 587 So.2d 1175 (Fla. App. 4 Dist. 1991) (accused's due process rights were violated where informant given carte blanche to set up drug deals, in return for favorable sentence reduction in his own pending criminal charges).

This case presents an abundance of outrageous Government conduct involving the creating of crime and improper inducement of a reluctant accused, justifying dismissal of petitioner's charges as a matter of law. Unique to this case is the additional fact that petitioner was protected *by statute and regulation* from Government interference with his rehabilitation efforts. Law enforcement's disdain for controlling statutes and regulations is outrageous conduct in and of itself. The lower court's lead opinion by Judge Crawford summarily disposed of this issue in one sentence: "[L]astly, this case does not involve outrageous government conduct." *See* Appendix A at 19a (citation omitted). Even if the statutory and regulatory violations alone do not warrant dismissal as the lower court's majority opinions suggest, they are some of the many aggravating factors which cumulatively show law enforcement abuses at their worst.

Petitioner submits that this Court should, through this case, recognize an outrageous Government conduct defense in order to curb law enforcement abuses. As discussed in *Mosely*, most circuits recognize the viability of such a defense. However, there is an actual, and potentially greater split of authority among the circuits regarding what consitutes outrageous conduct, and what tests or other appropriate legal standards should be applied in cases wherein the issues arises. Additionally, the Florida courts are wrestling with whether the outrageous Government conduct defense is essentially a return to the objec-

tive entrapment theory. *See Krajewski* at 1180-83. This Court can resolve that uncertainty through this case.

Petitioner does not seek to create new law, but asks this Court to apply existing law. In *Russell*, 411 U.S. at 432, this Court found that an undercover agent's infiltration of a drug-making operation and supplying a necessary ingredient was not shocking and fundamentally unfair law enforcement conduct, and was not barred by the Due Process Clause of the Fifth Amendment. *Citing Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960). In *Kinsella*, this Court disallowed the peacetime court-martial of a soldier's civilian dependent wife. In addressing the limits of due process, this Court stated:

> "Due Process cannot create or enlarge power. It has to do [ ] with the denial of that "fundamental fairness shocking to the universal sense of justice." It deals neither with power nor with jurisdiction, but with their exercise."

Kinsella, 361 U.S. at 246 (citations omitted). Petitioner sincerely sought drug rehabilitation for nine months, and the law protected him from Government interference with that effort. He was in a class of people protected by statute and regulation. The Government's exercise of police power in this case not only denied petitioner due process of law, it was also fundamentally unfair, shocking, outrageous, and intolerable. The "universal sense of justice," described by this Court as being a mandate of the Fifth Amendment's Due Process Clause, was clearly denied in petitioner's case.

CONCLUSION

A total of six judges from the Court of Military Appeals reviewed petitioner's case. Three of the six found that not only was petitioner entrapped as a matter of law, but the

conduct of the Government was outrageous enough to warrant dismissal. Four of the six judges correctly applied *Sherman* in holding the Government accountable for activities of its own agents. In finding no entrapment, the majority opinions distorted critical facts and disregarded this Court's precedent in *Sherman* and *Jacobson*. The majority opinions failed to recognize the statutory and regulatory intent behind the Drug Abuse Prevention, Treatment, and Rehabilitation Act and the corresponding Federal and Army regulations. The court's "harmless error" analysis and its refusal to invoke a judicial remedy has left petitioner and other members of the armed forces without *any* meaningful remedy for even willful violations by law enforcement agents. Petitioner was denied due process of law in that the statutory and regulatory provisions conferred a right and a benefit on petitioner to sincerely seek rehabilitative treatment free from government interference. The abundance of outrageous Government conduct, along with its willful violation of statutes and regulations designed to protect petitioner from overzealous law enforcement practices, was shocking to the universal sense of justice. Dismissal of the charges is warranted on due process grounds, regardless of whether petitioner was predisposed to commit any offenses.

Respectfully Submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 65,924.
CM 8902034.

UNITED STATES, APPELLEE,

v.

SIDNEY P. COOPER, SERGEANT FIRST CLASS,
U.S. ARMY, APPELLANT.

Reargued April 7, 1992.
Decided Sept. 30, 1992.

For Appellant: *Major James M. Heaton* (reargued); *Lieutenant Colonel James H. Weise.*

For Apellee: *Captain Samuel J. Smith, Jr. (reargued); Lieutenant Colonel Daniel J. Dell'Orto* and *Major Kenneth T. Grant.*

Opinion

CRAWFORD, Judge:

This case is before us to reconsider our opinion in *United States v. Cooper,* 33 MJ 356 (CMA 1991). This Court granted reconsideration to determine whether the known targeting of an individual in a drug rehabilitation program requires dismissal of the charges and whether appellant was entrapped within the meaning of *Jacobson v. United States,* __ U.S. __, 112 S. Ct. 1535, 118 L.Ed.2d 147 (1992).

We hold that the known targeting of an individual in a drug rehabilitation program does not require dismissal of the charges and that appellant was not entrapped within the meaning of *Jacobson*.

I

Appellant voluntarily entered a drug treatment center operated by the Navy in Miramar, California, on September 6, 1988, for 6 weeks of intensive in-house drug rehabilitation and treatment. Upon completion of the 6-week program, he continued receiving treatment on an out-patient basis at Fort Myer, Virginia. This out-patient treatment lasted for 6 more months and involved attending daily counseling sessions and nightly meetings of Narcotics Anonymous.

In the fall of 1988, agents of the Army Criminal Investigation Command (CID) suspected that there was a drug ring operating within its headquarters. At about that same time, Mr. Rodney Powell, who had been arrested by military authorities for allegedly stealing and pawning his girlfriend's television set to obtain cash to buy cocaine, approached the CID to offer his cooperation in the drug-ring investigation. Powell wanted to reenlist in the Army and sought to exchange his cooperation with the CID drug suppression team for CID support for his reenlistment. Thus, the proverbial marriage of convenience was consummated.

Powell gave the CID the names of five or six individuals whom he claimed had sold drugs within the CID headquarters facility. Appellant was one of these individuals. As part of his cooperation, Powell agreed to attempt to purchase drugs from these individuals in a CID sting operation. On November 30, 1988, Powell made a drug buy from one of the named individuals and on December 1 made a second drug buy from another.

On December 2, Powell made a telephone call to appellant from the CID drug suppression team office. Present in the office was Powell's CID handler, a 21-year-old specialist who had completed basic training in July 1987 and had worked on the drug suppression team since August 1988. Powell testified that he called appellant and asked if he could get some drugs. Appellant responded that he was "not using" drugs and was not "doing anything else." However, Powell testified that he called again.[1] The exact number of calls is disputed. Powell told appellant, "I had this white boy that had some money and wanted to sell some, and I didn't know where to get any from, and did he know?" Whereupon appellant agreed to help Powell.

Powell and appellant scheduled a rendezvous at 2:25 p.m. on December 2 at the 7-Eleven store on Columbia Pike in Falls Church, Virginia, near the building where appellant worked. Appellant met Powell and the CID handler at the appointed time and place. They proceeded together in the CID agent's car to an apartment in a multiple dwelling unit in Washington, D.C. During the ride to the dwelling, appellant admitted to selling drugs while stationed in Panama and explained to the CID handler how to turn powder into crack cocaine. The handler testified that it was during this car ride that he also learned for the first time that appellant was in a drug rehabilitation program. Powell testified that appellant "had been in rehabilitation treatment in California." The handler also testified that he was not familiar with Army Regulation (AR) 600-85 or 195-15.

Upon arriving at an apartment in Washington, D.C., Powell and the handler went with appellant to the dwelling

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[1] Powell only agreed to testify for the defense under a grant of immunity. He was angry at the CID agents when they would not continue to pay him to make other buys.

where appellant had a conversation with some individuals in the apartment. Following that conversation, he took Powell and the handler to another apartment. There he was told by an unknown individual that there were no drugs there at that time but that there would be some there in a short period of time. Appellant, as well as Powell and the handler decided to take a break and went across the street to a Safeway store for a pack of cigarettes. After a short time, appellant returned to the second apartment and obtained cocaine while Powell and the handler waited in the car. When he returned to the car, appellant indicated that he had a "good deal" and would do it again if they needed more. Additionally, he suggested some locations for selling drugs.

On December 5, Powell telephoned appellant again and asked if appellant would make another drug purchase. Appellant replied in the affirmative, and they agreed to meet at the same 7-Eleven store. Upon meeting there, appellant suggested that, rather than taking the handler's car, they take his car as he could drive and get them there quicker. On the way to the crack house appellant indicated that he could make a third buy for the handler but this would have to be done before Wednesday as his wife was arriving on that day. When they reached the same location where the first purchase was made, two black males across the street from the apartment building approached appellant. Appellant appeared to recognize them because he waved at them. They turned out to be appellant's suppliers. Although appellant expressed some concern that the two men might be armed with automatic weapons under their trenchcoats, he showed no hesitancy in getting out of the car and talking to them. He then returned to the car, took $500 from the handler, and accompanied the two men into the apartment house. After about 10 minutes, appellant returned with drugs. Once again he indicated

that it was a good deal and this time asked that he be compensated for his services.

II

As indicated by Judge Cox in his original opinion herein, this case "is a sad commentary on the lure and addictive nature of cocaine." 33 MJ at 357 n.3. We also agree with the views expressed by Senior Judge Everett in *Cooper* as follows:

> In the view of many, illegal drugs is the single most serious law enforcement problem facing governments at all levels today. Drug abuse is a killer: It kills bodies; it kills spirit; it kills imagination; it kills love. It is not hyperbolic to call the drug epidemic in this country a human and social tragedy. Appellant's personal downfall, summarized in footnote 3 of the lead opinion, is all too common.
>
> Law-enforcement efforts, however, are not enough, alone, to remedy this sickness. We cannot—and we do not—give up on the lives and souls of those whose addictions own them; we can—and we do—put huge efforts into helping the helpless regain control of their own destinies. This not only is the morally right thing to do, but also it is socially beneficial.
>
> Rehabilitation of a drug addict is extremely difficult. The physical and psychological torment that the addict experiences is a personal hell that, I am confident, cannot be fully appreciated by anyone who has not suffered the experience. It is, as well, a fragile process—one that is not without inherent steps backward and one that easily can be frustrated by outside influences.

Id. at 361. But this is not a case in which an alcoholic is given alcohol to drink or a cocaine user is given cocaine

to use. Instead, this is an instance in which an individual who had sold cocaine in the past was willing to become a distributor for profit, a merchant in the spread of human misery that is this country's drug epidemic.

III

In our prior opinion Judge Cox did not find a knowing targeting of an individual in a drug rehabilitation program. Chief Judge Sullivan, concurring in the result, indicated the case need not be resolved on the agent's lack of knowledge because the regulations prohibit gathering information from individuals in a drug rehabilitation program and not a "sting" operation.

Senior Judge Everett recognized the evils of drug abuse, the importance of rehabilitation, and the difficulty of rehabilitating individuals who had been involved in drugs. He believed that the regulations required that participants in the drug rehabilitation program

> be left alone, free from any government contacts that might well frustrate the successful rehabilitation of the patient. Any action that might psychologically lure a flawed and vulnerable addict back into the environment he is trying so mightily to shun is morally reprehensible and legally proscribed.

Id. at 362.

IV

Both the federal criminal law system and the military criminal law system have varied sources of rights. The hierarchical sources of rights in the military include the Constitution; Federal statues, *e.g.*, the Uniform Code of Military Justice; the Executive Orders containing the Military Rules of Evidence and the Rules for Courts-

Martial; Department of Defense directives; service directives; and federal common law. The varied sources in the Federal system include the Constitution, Federal statutes, Federal Rules of Criminal Procedure, Federal Rules of Evidence, and common law. These sources are set forth in terms of paramountcy. Even so, service directives may set forth greater rights than required by the Constitution, the Code, or the Manual for Courts-Martial, United States, 1984.

In determining whether the charges should be dismissed for a violation of service directives, examination must be made of the Supreme Court decisions concerning the nature of the directive and those discussing the dismissal remedy for prosecutorial misconduct under the Federal Rules of Criminal Procedure and constitutional violations by investigators.

V

The regulations applicable to this case are an outgrowth of 21 USC § 1101 *et seq.*, first enacted in 1972. Congress was determined to have a national policy which focused the resources of the Federal Government on drug abuse, hoping to reduce significantly the incidence of drug abuse, as well as the social and personal cost to the country. Congress also sought to ensure that a long-term strategy was developed by various departments of the Government to combat drug abuse.

The Army's program was an outgrowth of this strategy. To encourage individuals to take advantage of the Army drug abuse rehabilitation program, a series of rules were set up to encourage individuals on their own initiative to identify themselves and enter the programs for treatment and rehabilitation. However, AR 600-85 has a "limited-use policy" which provides for the free flow of information

and prevents misuse of this information.[2] The program was not intended to protect a soldier attempting to avoid disciplinary or adverse action. The limited-use policy did not grant immunity but provided that, if there was a self-referral or a command referral, information concerning illegal drug abuse or evidence of incidental possession for personal use obtained as part of medical care or rehabilitative treatment may not be used by law en-

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[2] Paragraph 2-16a of Army Regulation (AR) 600-85, Personnel—General: Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 88), states:

> It is Army policy to encourage voluntary entry into the ADAPCP. Military Police, Criminal Investigation Division [sic] (CID) special agents, and other investigative personnel will not solicit information from clients in the program, unless they volunteer to provide information and assistance.

Also, paragraph 2-16b of this same regulation recognizes:

> Title 42, Code of Federal Regulations, prohibits undercover agents from enrolling in or otherwise infiltrating an alcohol or other drug treatment or rehabilitation program for the purpose of law enforcement activities.

The parallel civilian regulation, § 2.17, 42 C.F.R. Ch. 1 (10-1-90 Edition) provides:

> § 2.17 Undercover agents and informants.
>
> (a) *Restrictions on placement.* Except as specifically authorized by a court order granted under § 2.67 of these regulations, no program may knowingly employ, or enroll as a patient, any undercover agent or informant.
>
> (b) *Restriction on use of information. No information obtained by an undercover agent or informant, whether or not that undercover agent or informant is placed in a program pursuant to an authorizing court order, may be used to criminally investigate or prosecute any patient.*

[52 FR 21809, June 9, 1987; 52 FR 42061, Nov. 2, 1987] (Emphasis added.)

forcement.[3] This limited use of the information applied whether there was command referral or referral by the individual himself or herself. Only drug use or possession incidental to normal use was protected.[4] It did not protect

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[3] Paragraph 3-7, AR 195-2, Criminal Investigation: Criminal Investigation Activities (30 Oct 85), charges:

> In compliance with the Army's ADAPCP policy, CID will investigate participants in ADAPCP for controlled substance offenses only if the offense occurred after entry into the program or if the participant has been identified as a suspect or subject prior to the time of entry into the program. Participants in ADAPCP will not be knowingly approached by CID special agents for the purpose of soliciting information about controlled substances distribution unless the participant voluntarily offers to provide such information.

Even more pointedly, paragraph 2-5b(5), CID Regulation 195-15, Criminal Investigation: USACIDC Source Program (1 Nov. 1987), asserts:

> The Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) prohibitions and restrictions are defined in AR 600-85. USACIDC special agents and other investigative personnel, to include sources, will not solicit information from participants in ADAPCP. Information which is volunteered is acceptable, as long as it is not obtained within an ADAPCP facility or in such a manner as to jeopardize the safety of the source or in a way which compromises the credibility of the ADAPCP.

[4] *Cf.* Alvarey, *The Scope of the Alcohol and Drug Abuse Prevention and Control Program's Exemption Policy,* The Army Lawyer 12, 13 (Dept. of the Army Pamphlet 27-50-92, August 1980) (footnote omitted).

Under the predecessor to AR 600-85 at issue in this case, Major Alvarey stated in his article:

> Transactional immunity is applicable only if the offense is one of alcohol abuse, drug use, or drug possession incidental to personal use. . . . Sniffing cocaine and smoking marijuana would likewise fall within the transactional immunity provisions since one who is dependent on drugs would be likely to commit these offenses. On the contrary, transactional immunity would not attach to robbery since it is not an offense which is directly related

an individual in terms of an immunity or a limited-use policy as to information regarding sales or distribution, and we agree with the rationale of Chief Judge Sullivan as expressed below that it would not protect appellant in this case:

> Paragraph 3-7, Army Regulation 195-2 (30 Oct. 1985) . . . prohibited . . . the gathering of information, not the conducting of a "sting" operation. . . . The regulations do proscribe placement of informants in these programs, and use of information gathered by informants or undercover agents against the patients of such a program. However, these regulations cannot be reasonably construed to give patients immunity for post-entry drug offenses observed and participated in by government agents or informants.

33 MJ at 359-60.

However, even if we were to read these regulations to protect appellant from buying drugs, under a series of Supreme Court cases, appellant would not be entitled to dismissal of the charges.

VI

In *Bank of Nova Scotia v. United States,* 487 U.S. 250, 254, 108 S.Ct. 2369, 2373, 101 L.Ed.2d 228 (1988), the Court indicated in an 8-1 opinion that it was inappropriate for the Federal courts to dismiss indictments in the absence of prejudice. The trial court in *Bank of Nova Scotia* found a number of violations of Fed.R.Crim.P. 6

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to alcohol abuse, drug use, or drug possession incidental to personal use, even if it is committed while the servicemember is under the influence of drugs or alcohol. Nor would transactional immunity attach for the sale or distribution of marijuana since these are not offenses of drug use or possession incidental to personal use.

governing grand-jury proceedings. Even so, the Supreme Court considered and rejected use of the dismissal remedy without examining for prejudice. To hold otherwise, the Court indicated, would be a violation of the commands of Fed. R. Crim. P. 52(a), which requires the Federal courts to disregard "[a]ny error . . . which does not affect [the] substantial rights" of the accused. "It follows that Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress. . . ." *Id.* at 255, 108 S.Ct. at 2373. The Court also noted that there was no "history of prosecutorial misconduct" spanning a number of years so "as to raise a substantial" or "serious question" of a systemic problem. *Id.* at 259, 108 S.Ct. at 2376. Applying the prejudice test, the Court indicated that the critical issues are: what effect the error had or reasonably may be taken to have had on the grand jury's decision; whether it has been "established that the violation substantially influenced the grand jury's decision to indict"; or whether there exists "grave doubt" that the indictment "was free from the substantial influence of [the] violations." *Id.* at 256, 108 S.Ct. at 2374. The Court noted that Fed.R.Crim.P. 52 had a statutory base and had the same "force and effect" as a statute. *Id.* at 255, 108 S.Ct. at 2373. Thus, a Federal court has no "discretion to disregard the Rule's mandate" because to do so would "disregard constitutional or statutory provisions." *Id.* at 255, 108 S.Ct. at 2374. Justice Kennedy went on to state: "The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked 'because a court has elected to analyze the question under the supervisory power.' " *Id.* at 255, 108 S.Ct. at 2374, quoting *United States v. Payner,* 447 U.S. 727, 736, 100 S.Ct. 2439, 2447, 65 L.Ed.2d 468 (1980). The majority noted that this case should be distinguished from "a class of cases in which indictments are dismissed" because "the

prejudicial impact" is so great there are deemed to be fundamental errors. An example would be the discriminatory selection of a grand jury. 487 U.S. at 256-57, 108 S.Ct. at 2374-75. Even so, the courts must look to see whether alternative remedies are available. *Id.* at 257, 108 S.Ct. at 2374.

Likewise, in *United States v. Mechanik,* 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), the Court held dismissal is not an appropriate remedy for misconduct in the indictment process when the error had been rendered harmless. The Court in *Mechanik* assumed that there had been a violation of Fed.R.Crim.P. 6(d) by the presence of other than specified persons, but indicated that the error was harmless based upon the factfinder's subsequent guilty verdict. Thus, an error cannot be considered other than harmless where it would not have influenced the decision of the factfinder.

Even when there have been allegations of flagrant and persistent prosecutorial misconduct, as in *United States v. Hasting,* 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), the Court held that a court should not mandate automatic reversal without regard to the prejudicial impact of the misconduct, even where the conduct ws occurring "with disturbing frequency . . . throughout th[e] circuit." *Id.* at 504, 103 S.Ct. at 1978. The Court insisted upon the harmless-error test being applied.

The harmless-error analysis should be applied in lieu of post-conviction dismissals. The court in *Hasting* indicated within certain parameters that Federal courts may exercise their "supervisory powers . . . within limits [to] formulate procedural rules not specifically required by the Constitution or the Congress." *Id.* at 505, 103 S.Ct. at 1978. The implication is that the harmless-error rule should be applied unless there is no reasonable alternative to dismissal. *Id.* at 506 n.5, 103 S.Ct. at 1979 n. 5. The same rule would

be binding on the Court of Military Appeals as to application of Article 59(a), Uniform Code of Military Justice, 10 USC § 859(a).

The Supreme Court also has not permitted employment of the exclusinary rule for violation of Internal Revenue Service regulations prohibiting consensual electronic surveillance between taxpayers and IRS agents absent prior authorization. *United States v. Caceres,* 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979). In *Caceres* the Court in a 7-2 opinion noted that neither the Constitution nor a Federal statute requires an official to approve consensual electronic surveillance. The duty to enforce an agency regulation is most evident when compliance is mandated by either the Constitution or a statute to ensure a basic right. *Bridge v. Wixon,* 326 U.S. 135, 152-53, 65 S.Ct. 1443, 1451-52, 89 L.Ed. 2103 (1945). However, an error in interpreting the regulation does not give rise to a Constitutional question. "Nor is . . . the Due Process Clause . . . implicated because an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially becuase of their violation by the agency." 440 U.S. at 752-53, 99 S.Ct. at 1471-72. To adopt

> a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures. Here, the Executive itself has provided for internal sanctions in cases of knowing violations of the electronic-surveillance regulations. To go beyond that, and require exclusion in every case, would take away from the Executive Department the primary responsibility for fashioning the appropriate remedy for the violation of its regulations.

Id. at 755-56, 99 S.Ct. at 1473-74 (footnotes omitted). The

Court indicated that such a result might lead to "fewer and less protective regulations." *Id.* at 756, 99 S.Ct. at 1474. It would certainly seem more desirable to enforce these rules through the regulatory process, rather than having no rules to protect those who are in drug rehabilitation programs. As the Court stated in *Caceres:*

> In the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form.

Id. at 756, 99 S.Ct. at 1474. The court indicated that suppression of evidence should not be granted in the exercise of supervisory power. *Id.* at 757, 99 S.Ct. at 1474. Otherwise, it "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. . . . [T]he supervisory power does not extend so far." *United States v. Payner,* 447 U.S. at 737, 100 S.Ct. at 2447.

Recently the Court stated in *United States v. Alvarez-Machain,* __ U.S. __, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992):

> Respondent and his *amici* may be correct that respondent's abduction was "shocking," . . . . [but] the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch.

Id. at __. 112 S.Ct. at 2196 (footnote omitted).

The Court in *Payner* and *Hasting* showed displeasure with the Federal courts exercising their supervisory power while disregarding the rules of criminal procedure or the constitutional decisions of the Court. It also indicated in *Hasting* that "reversals of convictions under the Court's

supervisory power must be 'approached with some caution.' " 461 U.S. at 506-07, 103 S.Ct. at 1979. The Court expressed dissatisfaction that the Court of Appeals in dismissing the charges in *Hasting* did not consider a trauma to the victim of a particular heinous crime or the practical problems of retrying the case 4 years after the event.

These decisions are binding on the Federal Courts of Appeals and the Court of Military Appeals, all subject to the direct review of the Supreme Court.

VII

This does not mean that we necessarily condone the law enforcement conduct that took place in this case. One cannot help but feel sympathy for a defendant caught up in these circumstances. However, this does not give rise to use of this Court's supervisory authority to dismiss the charges, particularly when those in charge of enforcing the regulations could take action on their own, but have not chosen to do so.

Even though Powell, a non-government informant, admitted knowing that appellant had been in a drug rehabilitation program in California, this knowledge should not be imputed to the Government. A parallel situation occurs when deliberately false or reckless statements made by non-government informants are not imputed to police officers. *See United States v. Henry,* 933 F.2d 553 (7th Cir.1991). The Supreme Court indicated it would leave this imputation question for another day. In *Franks v. Delaware,* 438 U.S. 154, 170, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978), the Court stated:

> [B]ecause we are faced today with only the question of the integrity of the affiant's representations as to his own activities, we need not decide, and we in no

> way predetermine, the difficult question whether a reviewing court must ever require the revelation of the identity of an informant. . . .

This is not an instance of an individual expressly recruited and hired to work on a case. Powell was seeking help because of his own arrest, had agreed to work with law enforcement officials, and was compensated for his tips.

The handler testified that he did not know that appellant was in a drug rehabilitation program until the trip to Washington, D.C., to make the first purchase. He further testified that he was not aware of the Army regulations governing use of information garnered from individuals in the drug rehabilitation program. While his ignorance of applicable regulations is regrettable, it should not give rise to dismissal of the charges.

If we were to take action such as dismissing the charges, it could have a chilling effect on the formulation of additional standards by the Executive Department. There are a variety of tools available to the Executive Branch to determine whether a violation of its regulations has occurred and, if so, what action should be taken against those violating the regulations, *e.g.*, prosecution under Article 92, UCMJ, 10 USC § 892, administrative actions against the responsible individuals, and notations on fitness reports.

Appellant should have no right to a dismissal of the charges against him because the alleged violations of internal policy rules did not in any way affect the facts presented as to whether the crime was permitted. This is not an instance of a violation of a regulation resulting in introduction of unreliable evidence.

VIII

In *Jacobson v. United States*, __ U.S. __, 112 S.Ct.

1535, 118 L.Ed.2d 147 (1992), the Supreme Court held that the Government's sting operation amounted to entrapment when after more than 26 months of communicating with a target via mailed pamphlets, "pen-pal" letters, attitude surveys, and catalogs, they finally persuaded him to order a magazine containing child pornography. The majority recognized that the Government may use undercover agents and various strategems to catch those engaged in criminal activities. Citing prior case law the majority said that "however, Government agents may not originate a criminal design, and plant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Id.* at __, 112 S.Ct. at 1540. *See also United States v. Whittle,* 34 MJ 206 (CMA 1992).

RCM 916(g), Manual, *supra,* sets forth two elements for the entrapment defense: "It is a defense that the criminal design or suggestion to commit the offense originated in the Government and that the accused had no predisposition to commit the offense." The first element is referred to as the inducement element and the second, as the predisposition element. As in *Jacobson* and in this case, the inducement element is not an issue as the Government does not dispute that appellant was induced to commit the crime. The sole issue is the predisposition element. In *Jacobson,* the Court indicated that, when "the defense of entrapment is at issue, . . . the prosecution must prove beyond [a] reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." __ U.S. at __, 112 S.Ct. at 1540. The predisposition element could be established by the following: reasonable suspicion that the defendant has been involved with the sale of cocaine in the past[5] or evidence that

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[5] To prevent reliance on rumors as to past use or possession, reliability of the informant should be well-established. *United States v. Skrzek,* 47 CMR 314, 316-18 (ACMR 1973).

the person drawn to the opportunity was predisposed to engage in the contemplated illegal activity. How a person behaves on a particular occasion is some evidence of predisposition.

The latter may be shown circumstantially by introducing evidence of the following: accused merely afforded opportunity to commit the crime, *Sherman v. United States,* 356 U.S. 369, 372, 78 S.Ct. 819, 820, 2 L.Ed.2d 848 (1958); a single invitation without any fraud or trickery, *United States v. Suter,* 21 USCMA 510, 515, 45 CMR 284, 289 (1972); informant not a friend of accused, *United States v. McGlenn,* 8 USCMA 286, 24 CMR 96 (1957); a profit motive, *United States v. Hebert,* 1 MJ 84 (CMA 1975); or a ready response to informant's initial suggestion, *United States v. Williams,* 3 MJ 555 (ACMR 1977), *rev'd on other grounds.* 4 MJ 336 (CMA 1978).

"The sole piece of preinvestigation evidence" in *Jacobson* was a "1984 order" to lawfully receive a magazine entitled 'Bare Boys." __ U.S. at __, 112 S.Ct. at 1541. Justice White concluded in *Jacobson:* "Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal." *Id.* at __, 112 S.Ct. at 1542.

There was more than a "sole piece of . . . evidence" in this case.[6] There was evidence that appellant had used and sold cocaine in the past. In fact, he bragged about the ability to make crack from powdered cocaine. Second,

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[6] In contrast to the dissent's factual assertions, one could easily draw different interpretations. But we must recognize that the prior opinion as to the facts is not binding because we are not a factfinding authority. A fair reading of the facts does not support the dissent. In any event, as to the entrapment issue, all reasonable inferences and credibility choices must be drawn in favor of the court members' verdict. *United States v. Leavitt,* 878 F.2d 1329, 1335 (11th Cir. 1989). The same is true of the due process issue.

depending on whose testimony you accept, there was either a single invitation to distribute drugs or three invitations within a short period of time; and the invitation was accepted by appellant. Additionally, at least on one occasion, appellant indicated that he would like his profit and showed his willingness to buy other drugs for the government agent anytime before his wife's arrival.

Lastly, this case does not involve outrageous government conduct. *See, e.g., United States v. Winslow,* 962 F.2d 845, 849 (9th Cir.1992)(furnishing bomb components not outrageous conduct).

The decision of the United States Army Court of Military Review is affirmed.

COX, Judge (concurring):

I agree with Judge Crawford's opinion. I write only to underscore several points. First, service regulations are Executive Branch creations, and there are many of them. Most of these directives establish policies and procedures for the orderly governance of the service. A small percentage of service regulations, by their terms, are "punitive regulations, in whole or in part. Failure to comply with punitive regulations can result in punishment under Article 92, Uniform Code of Military Justice, 10 USC § 892, which proscribes, inter alia, the violation of or failure to obey any lawful general order or regulation. This case has nothing to do with Article 92.

Rather, appellant was charged with distributing drugs under Article 112a, UCMJ, 10 USC § 912a. His claim, however, is that he is entitled to have his prosecution barred, or the evidence suppressed by virtue of the Army's drug rehabilitation regulations. Admittedly, as amply described in the principal opinion, those regulations restrict law enforcement agents from approaching persons

in the drug rehabilitation program and from soliciting information about drug activities. Appellant's complaint, however, is misdirected.

The Secretary of the Army, the proponent of these regulations, established the drug rehabilitation program. Presumably the language forbidding military law enforcement authorities from soliciting information was designed to create something of a sanctuary for those in the program, and to convince prospective enrollees of the integrity of the program. If law enforcement officers were to use those programs as target pools for investigative purposes, the word undoubtedly would quickly get out. The result would be that few drug users would apply, and the program would fail its purpose of saving soldiers.

That unfortunte consequence does not convert a bar to approaching into a bar to prosecution or an exclusionary rule. It is not the mission of this or any military court to make the Secretary's drug program more effective. If the Secretary believes that law enforcement personnel are mucking up his program, the Secretary can fix that, and he can certainly inhibit prosecutions in derogation of his regulations.

On the other hand, had appellant found himself in trouble *as a consequence of turning himself in* or for providing drug-related information as requested, no shortage of remedies would be available. Likewise, as Chief Judge Sullivan points out in *United States v. Cooper,* 33 MJ 356, 360 (CMA 1991)(concurring in the result), had the agents tried to entice appellant back to drug usage, the results would be far different. In addition, as I earlier indicated, had law enforcement authorities "sought out" appellant *because he ws in the program* "for the purpose of setting him up for a subsequent arrest," *id.* at 358, I would find a violation of due process.

However, such things did not occur here. Instead, ap-

pellant was approached by a friend-turned-informant. The record does not even indicate that the informant knew appellant was still in drug rehabilitation *at the time appellant was approached.* Further, the record makes it clear that the agent did not know appellant was in a program until the first transaction was *in progress.* Thus appellant clearly was not targeted as a result of being in the program.

In addition, there is no hint in this record that appellant was being tempted by authorities to use drugs himself. To the contrary, the appeal was not to appellant's addiction to drugs but to his willingness to traffic in the misery of others. I find nothing in the Fourth, Fifth, or Sixth Amendment that succors that.

SULLIVAN, Chief Judge (concurring in part and in the result):

I join the lead opinion today to the extend it tracks my earlier opinion in this case. *See United States v. Cooper,* 33 MJ 356, 359 (Sullivan, C.J., concurring in the result). I also join its analysis based on *Jacobson v. United States,* __ U.S. __, 112 S.Ct. 1535, 118 L.Ed.2d 147 (1992). However, I offer no comment on Parts VI and VII of this opinion which I consider unnecessary.

GIERKE and WISS, Judges (dissenting):

We have carefully considered the opinions filed originally in this appeal by the Chief Judge, Judge Cox, and Senior Judge Everett, 33 MJ 356 (1991), as well as the lead opinion and separate opinions on this reconsideration. After doing so, we find ourselves in agreement with the dissenting opinion of Senior Judge Everett, *id.* at 360, so we must dissent from the lead opinion here because it suffers from the same analytical flaws that were addressed in that opinion. In addition to embracing that opinion,

however, we write to offer some specific comments on the Court's treatment of this appeal on reconsideration.

I

A

The rather benign factual scenario leading to this prosecution that is set out in the lead opinion omits a number of important points that not only are not so benign but also are legally important.

First, when Powell gave the agents of the Army's Criminal Investigation Command (CID) appellant's name as one of the five people he was to turn in who were "dealing drugs," Powell had no basis at all on which to even suspect that appellant *ever* had distributed drugs, much less that he still was doing so. As Senior Judge Everett noted, "Appellant came to Powell's mind because the two of them had, in the past, used cocaine together. Powell candidly admitted at trial, however, that he had no knowledge at all that appellant ever had sold drugs." *Id.* at 362. He figuratively pulled appellant's name out of a hat.

Second, Agent Duperron, Powell's CID handler, did testify that he first had learned of appellant's participation in a drug-rehabilitation program during the car ride to Washington, D.C., as the lead opinion states. Senior Judge Everett pointed out, however, that Duperron acknowledged on cross-examination that he "could not 'recall' whether Powell had told him early on about appellant's rehabilitation participation" and conceded "that Powell 'could have' told him that." *Id.* at 362. Thus, Duperron's late-learning of appellant's rehabilitation effort is not clearly established in the record, as the lead opinion asserts.

Third, even before the initial telephone call that Powell made to tempt appellant, out of the blue, to distribute drugs, Powell knew that appellant was in drug rehabilitation. *That* was the *reason* that, as the lead opinion

acknowledges, appellant told Powell "that he was 'not using' drugs and was not 'doing anything else.' " 35 MJ at 418. Undeterred, however, by having no reason to suspect that appellant ever had distributed drugs and by knowing that appellant then was in a rehabilitation program, Powell doggedly pursued his plan to enlist appellant into distributing drugs to him.

B

Judge Crawford here, as did Judge Cox in the original appeal, asserts that Powell's conceded knowledge from the beginning that appellant was in rehabilitation "should not be imputed to the Government." By way of rationale, the majority likens this to a "parallel situation" where a "non-government" informant's "deliberately false or reckless statements . . . are not imputed to police" who then seek a search warrant 35 MJ at 424.

One does not need to look, however, for a "parallel situation." As Senior Judge Everett pointed out in the original appeal, "[T]he Government cannot escape the taint associated with Powell's own knowledge of this participation. 'The Government cannot make such use of an informer and then claim disassociation through ignorance.' *Sherman v. United States,* 356 U.S. 369, 375 [78 S.Ct. 819, 822, 2 L.Ed.2d 848] (1958)" 33 MJ at 362-63. As to whether Powell was a "non-government informant," para. 1-2d, CID Reg. 195-15, expressly acknowledges, "Registered sources are always considered agents of the Government." Moreover, as we discussed earlier, the record is far from clearly establishing that Dupperon, himself, did not have early knowledge of appellant's rehabilitation participation.

On the basis of *all* of the facts – including those omitted from the lead opinion but set out earlier in this opinion –

we agree with Senior Judge Everett that the CID's efforts to lure appellant into drug trafficking—while knowing that appellant then was in rehabilitation and without having any notion that, while in rehabilitation, appellant was violating the drug laws—flew in the face of applicable regulations. We reject as too narrow the view of Chief Judge Sullivan in his original opinion, adopted by the lead opinion here, that those regulations prohibit only "the gathering of information [from people in a rehabilitation program], not the conducting of a 'sting' operation." *See* 33 MJ at 359.

C

At this point, it seems appropriate to address the matter of regulatory violations by law enforcement personnel as bases for judicial relief—a matter to which the majority devotes a good deal of attention.

The two interrelated issues originally granted review by this Court question whether the Government "overc[a]me appellant's entrapment defense" (*see* Part II, *infra*) and "whether due process prohibited the police from pressing appellant to obtain cocaine." *See* 33 MJ at 356, 357. We have searched appellant's pleadings in vain to find where he has argued that the charges should be dismissed or the evidence suppressed (*see* Judge Cox's concurring opinion) *simply* on the ground that the Government violated service directives. Our understanding of appellant's argument on this issue is that public policy considerations which have been codified by federal statutes and promulgated through Army regulations prohibit government attempts to lure recovering addicts in rehabilitation programs back into drug-related crimes since such attempts waste resources and defeat rehabilitation efforts. Final Brief at 9.

Even the majority acknowledges that the regulations in

question here "are an outgrowth of 21 USC § 1101 *et seq.*, first enacted in 1972," which manifested the determination of Congress "to have a national policy which focused the resources of the Federal Government on drug abuse, hoping to reduce significantly the incidence of drug abuse, as well as the social and personal cost to the country." More specifically, the majority recognizes that "Congress also sought to ensure that a long-term strategy was developed by various departments of the Government to combat drug abuse. The Army's program was an outgrowth of this strategy." 35 MJ at 420-421.

With light thus properly focused on the granted issue and the basis of the argument in support of it, violation of service directives that occurred here has been only a means by which appellant has offered to show the outrageousness of the Government's conduct in enticing him into distributing drugs. Appellant contends that creating a crime through such governmental conduct should be considered "outrageous" enough to warrant dismissal of the charges on due process grounds.

Merely addressing whether government agents technically violated their regulations and whether those violations, if any, should result in dismissal of the charges simply sidesteps this issue. This is not a case of police or prosecutorial misconduct that occurred after a crime was committed and the culprit apprehended for that crime. Neither is this a case that properly is subject to the "harmless error" analysis suggested by the majority. *See* Part ID, *infra*. Instead, this is a case in which regulations have been issued for public-policy reasons to protect recovering drug addicts who are in a drug-rehabilitation program.

Creating a crime for an otherwise innocent party in one of these programs to commit, as happened here, does more than merely defeat the purpose of the regulations;

it also flies in the face of declared, long-standing public policy of Congress. Additionally, it is contrary to "[t]he function of law enforcement," which "is the prevention of crime and the apprehension of criminals." *Sherman v. United States, supra* at 372, 78 S.Ct. at 820. *See* Part II, *infra*.

Moreover, we seriously doubt that dismissal of appellant's charges on due process grounds based on reckless and legally proscribed behavior that creates a crime rather than enforces the law "could have a chilling effect on the formulation of additional standards by the Executive Department," as the lead opinion suggests. 35 MJ at 424. We believe it more likely that dismissal will result, if anything, in more conscientious law enforcement in which innocent persons are left alone and in which public policy is honored by those whose responsibility it is to enforce it.

D

Finally, we are bemused by the lead opinion's discussion of lack of "prejudice" in this case, 35 MJ at 422-423, in the same context as it would discuss prejudice from admission of erroneously discovered evidence. Let us be clear: Except for the Government's outrageous conduct in violation of a myriad of regulations that were promulgated to implement national policy, appellant would not have been telephoned at all by Powell.

Instead, a person who, for all anyone knew then or knows today, might have succeeded in rehabilitation was dragged back into the black-hole of the drug community and prosecuted and jailed, all in the name of law enforcement. We call that prejudice.

II

Relatedly, as to the issue of entrapment, it seems to us

as we mentioned earlier that the complete picture of the Government's active efforts here portrays a vision more like crime-creation than like law enforcement. Simply stated, there *was* no crime and there was no basis to believe there *could* be a crime—until the Government, in the form of its registered source Powell, *created* the crime.

The Supreme Court, in *Jacobson v. United States,* __ U.S. __, 112 S.Ct. 1535, 118 L.Ed.2d 147 (1992), held that, where the Government induces the criminal conduct—as the lead opinion acknowledges occurred here (35 MJ at 424)—"the prosecution must prove *beyond reasonable doubt* that the defendant was *disposed to commit the criminal act prior to first being approached* by Government agents." *Id.* at __, 112 S.Ct. at 1540 (emphasis added), quoting *Jacobson v. United States, supra,* at __, 112 S.Ct. at 1540. To meet this burden, the lead opinion focuses on three factors.

In order to put the facts of this case in context when considering these three factors more closely, it will be helpful at this point to pause to consider the facts in *Sherman v. United States, supra*—a case in which the Supreme Court held that the Government had entrapped the defendant—for the facts there were markedly similar to those presented here.

In *Sherman,* an unpaid government informant met the defendant at a doctor's office where apparently both were being treated for narcotics addiction. After making a number of requests, the informant finally talked the defendant into obtaining and selling narcotics to him, predicated on the informant's claimed suffering from not being able to respond to treatment. Several times thereafter, the defendant used the informant's purchase money to buy drugs not only for the informant but also for himself, as well as to pay for a taxi and other expenses related to obtaining the drugs. The informant then told Bureau of Narcotics agents about these events, and they later observed the defendant sell narcotics to the inform-

ant on three *occasions*. *The agent in* charge of the case "never bothered to question" the informant about how "he had made contact with" the defendant in the first place.

At the outset, as noted earlier, the Supreme Court held that the Government could not make use of this informant (even though he was unpaid) "and then claim disassociation through ignorance." *Id.* 356 U.S. at 375, 78 S.Ct. at 822. Without any consideration at all of the *Sherman* holding in this regard, the lead opinion in this case holds to the contrary, even though without doubt Powell was a *registered, paid* informant (receiving $75.00 for his first buy from appellant and $100.00 for his second one) who, though regrettably untethered to a law enforcement agent, was a player in their drug enforcement program.

Moreover, in weighing the facts to consider whether the Government had carried its burden on the entrapment issue, the Supreme Court—unlike each of our colleagues in the majority here—placed no distinction in the fact that the defendant had been asked to *sell* drugs, not to *use* them. The Supreme Court did point out, though, that the government-instigated sales to the informant had sadly induced the defendant to return to his old habit. *Id.* at 373, 78 S.Ct. at 821.

With this foundation, we can proceed to consider the three bases for the lead opinion's holding that the Government here proved beyond a reasonable doubt that appellant was disposed to sell drugs before the initial contact by Powell.

First, "There was evidence that appellant had used and sold cocaine in the past." 35 MJ at 425. We do not know what this supposed "evidence" is that appellant had sold drugs earlier. Powell expressly eschewed such knowledge. Possibly, the lead opinion is referring to appellant's conversational mention while in the car with Powell and Dupperon that he used to sell drugs in Panama. If so, that is

a flimsy prop on which to build a conclusion of predisposition beyond a reasonable doubt.

Appellant was last stationed in Panama 5 years before this incident. Since then, of course, appellant had voluntarily enrolled in the rehabilitation program that he was in when Powell illegally approached him. As an outpatient in that program, he had come up "negative" on his previous 11 drug tests after miserably failing all prior efforts at rehabilitation. *See* 33 MJ at 357 n.3.

The prosecution in *Sherman,* too, attempted to show predisposition by introducing dated drug activity of the defendant—there, a 9-year-old conviction for selling narcotics and a 5-year-old conviction for possession of narcotics. The Supreme Court held that such evidence was not sufficient to prove the defendant had a predisposition to sell narcotics at the time that the informant approached him, "particularly when we must assume from the record he was trying to overcome the narcotics habit at the time." *Sherman v. United States, supra* at 375-76, 78 S.Ct. at 822. The Court further noted that "[l]aw enforcement does not require methods" in which "the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." *Id.* at 376, 78 S.Ct. at 822.

In other words, just like the defendant in *Sherman,* at the time appellant was lured into his crimes, he was attempting to overcome his addiction, and his drug distributions in Panama 5 years earlier, if they occurred at all, offered no proof that he was predisposed to distribute drugs at the time he was targeted.

Second, the lead opinion concludes that it was not very difficult for the Government to induce appellant into distributing drugs. The lead opinion contends that, "depending on whose testimony you accept, there was either a single invitation to distribute drugs or three invitations

within a short period of time; and the invitation was accepted by appellant." 35 MJ at 425. *See United States v. Suter,* 21 USCMA 510, 515, 45 CMR 284, 289 (1972). Yet, Judge Cox, in the lead opinion on the initial appeal stated:

> Powell then contacted appellant, asking if he knew where he (Powell) could get some drugs. Appellant responded negatively, stating he was not 'using" drugs and was not "doing anything else." *However, Powell continued calling. . . . Appellant finally agreed to help Powell.*

33 MJ at 357 (emphasis added). The fact of this repeated calling is fully supported by Powell's testimony in the record.

Furthermore, in the context of the unusual circumstances of this case, this factor is not probative of appellant's predisposition, independent of the Government's acts, to distribute drugs. We do not consider the fact that an admitted drug addict who then is in a government-sponsored drug-rehabilitation program "finally agreed" to an old friend's "continued" imploring for help in the friend's quest for drugs to equate to "simply provid[ing appellant] with the opportunity to commit a crime." *See Jacobson v. United States, supra* at __, 112 S.Ct. at 1541.

Third, "at least on one occasion, appellant indicated that he would like his profit and showed his willingness to buy other drugs for the government agent anytime before his wife's arrival." 35 MJ at 425. In fact, appellant received no profit, and there was no evidence that he had taken a cut of the drugs for himself. After the second distribution, appellant did ask for—but did not receive—$20.00 for his services in this $500.00 transaction. By comparison, the defendant in *Sherman* had used more of the informant's money than was necessary to buy the drugs and then had used the money to support his own

just-renewed drug use. The Supreme Court did not view these facts as demonstrating a profit motive. Cooper's activities do not extend nearly this far. As in *Sherman*, the evil of pulling appellant back into the drug environment is readily apparent, regardless whether the inducement was to use or to distribute drugs.

Furthermore, by the time appellant made his unfulfilled request for $20.00, the die was cast: The Government—without *any* pre-investigation basis to believe that appellant, then doing his best to extricate himself from the drug culture that had all but broken his life, was in any way involved with drugs—had succeeded in dragging him back into that bedeviled environment via the surreptitious pleas of his friend *from* that environment.

In short, then, we cannot agree that the prosecution has "prove[d] beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *See Jacobson v. United States, supra* at __, 112 S.Ct. at 1540. None of the lead opinion's three bases individually nor all of them collectively shows beyond reasonable doubt that appellant "possessed the requisite predisposition prior to the Government's investigation and that it existed independent of" the reprehensible timing and nature of the Government's approach of appellant. *See id.* at __, 112 S.Ct. at 1543. Instead, we conclude that, in this case, "the Government play[ed] on the weaknesses of an innocent party and beguile[d] him into committing crimes which he otherwise would not have attempted." *Sherman v. United States, supra* at 376, 78 S.Ct. at 822, quoted in *Jacobson v. United States, supra* at __, 112 S.Ct. at 1543 (footnote omitted). Accordingly, we dissent.

APPENDIX B

U.S. COURT OF MILITARY APPEALS

No. 65,924.
CM 8902034.

UNITED STATES, APPELLEE,

v.

SIDNEY P. COOPER, SERGEANT FIRST CLASS,
U.S. ARMY, APPELLANT.

Argued July 9, 1991.
Decided Sept. 30, 1991.

For Appellant: *Captain James M. Heaton* (argued); *Lieutenant Colonel Russell S. Estey* (on brief); *Major Michael J. Kelleher* and *Captain Brian D. Bailey.*

For Appellee: *Captain Timothy J. Saviano* (argued); *Colonel Alfred F. Arquilla, Lieutenant Colonel Daniel J. Dell'Orto, Major Thomas E. Booth, Captain Kenneth T. Grant* (on brief).

Opinion

COX, Judge:

Agents of the Criminal Investigation Command (CID) initiated sting operations to clean-up a drug ring purportedly operating within its own headquarters.[1] Towards this end, CID agents engaged the assistance of Rodney

[1] So far as the record reveals, no CID agents were involved in this drug activity.

Powell, a known cocaine addict, who had previously worked at the headquarters as a driver for the CID commander.[2] The agents sought information from Powell because of his knowledge of drug use within the facility. Once on-board as a registered source, Powell divulged the names of five persons who he knew had sold drugs at the facility in question while he was there. Appellant's name was included.

Appellant, a recovering cocaine addict, was enrolled in the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) when Powell identified him to CID.[3] Powell then contacted appellant, asking if he knew

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[2] Powell left the Army months earlier under honorable conditions. However, his drug addiction soon left him unemployed and penniless. As a desperate effort, he submitted enlistment papers to Army recruiters, lying about his drug abuse. In or about November of 1988, authorities arrested Powell for stealing his girlfriend's television set, which he had pawned to get money for his cocaine dependence. It was at this point that CID learned of Powell's situation and considered the possibility of getting his assistance in breaking the drug ring.

[3] Appellant's story is a sad commentary on the lure and addictive nature of cocaine, and specifically crack cocaine. Appellant described the addictive lure of the drug as follows:

> It—it's—it's hard to explain. If you take every Christmas, every Fourth of July, every New Year's, every orgasm that you've ever[ ]had in your entire life and multiply it several thousand times and then cram it into your body in an instant, that was [the] pleasure of cocaine—crack cocaine.

Crack cocaine ruled appellant's life; his wife left him; sleep was short and far between; and his automatic teller card financed an addiction that depleted his savings account.

This behavior persisted until appellant found himself one morning on the floor of a "crack house" in Washington, D.C. He had smoked an entire paycheck on a crack cocaine binge. At this low point, he turned for help. He sought out the drug-rehabilitation center at Fort Myer, Virginia. There he requested treatment and was accepted into

where he (Powell) could get some drugs. Appellant responded negatively, stating he was not "using" drugs and was not "doing anything else." However, Powell continued calling. He testified that he told appellant, "I had this white boy that had some money and wanted to sell some, and I didn't know where to get any from, and did he know?" Appellant finally agreed to help Powell.

A meeting was set. On December 2, 1988, appellant led Powell and an undercover CID agent to a crack house. Once at the house, appellant entered and purchased the drugs and gave them to the undercover CID agent. The same sequence of events took place on December 5, 1988.

Appellant pleaded not guilty to the Charge and its two specifications of cocaine distribution, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a, but he did not dispute his role in the distribution of the drugs. Instead, his strategy placed the Government on trial by arguing that he was enticed back to the world of drugs when he was most vulnerable because of his rehabilitation. He raised the defense of entrapment. In addition, appellant asserted that the action taken by Powell

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the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP).

The program lasted 6 months, on an out-patient basis. Appellant attended daily counseling sessions and nightly meetings of Narcotics Anonymous. Family and friends rallied to his assistance: His older brother, an Air Force officer, took 30 days' leave to help appellant overcome his addiction. However, all efforts failed. From the time appellant entered the ADAPCP, he came-up positive on all ten drug tests conducted on him through September 6, 1988.

On September 9, 1988, appellant was transported to the Navy drug-treatment center in Miramar, California, which consisted of 6 weeks of intensive in-house treatment. Finally attaining success, appellant returned home at last able to resist crack cocaine. His treatment continued at home, at Fort Myer, on an out-patient basis. Since appellant's return from Miramar, all eleven drug tests had been negative.

and the CID violated Army and CID regulations governing participants in the ADAPCP. Army Regulation (AR) 600-85, Personnel—General: Alcohol and Drug Abuse Prevention and Control Program (21 October 1988, effective 21 November 1988); AR 195-2, Criminal Investigation: Criminal Investigation Activities (30 Oct.1985 Update). However, appellant's position proved futile; the members found him guilty of both specifications of distributing cocaine. The Court of Military Review affirmed the findings and sentence[4] in a short-form opinion dated November 5, 1990.

Appellant challenges his conviction on two fronts. First, he claims that he was denied due process of law because government agents solicited his involvement in the crimes while he was in the ADAPCP. Second, he asserts that the Government failed to overcome appellant's entrapment defense. We decide both questions adversely to appellant.

Due Process

Appellant's due process claim arises out of language in paragraph 3-7, AR 195-2, which states:

> In compliance with the Army's ADAPCP policy, CID will investigate participants in ADAPCP for controlled substance offenses only if the offense occurred after entry into the program or if the participant had been identified as a suspect or subject prior to the time of entry into the program. Participants in ADAPCP will not be knowingly approached by CID special agents for the purpose of soliciting information about controlled substances distribution unless

[4] Appellant was sentenced to a dishonorable discharge and 5 years' confinement. The sentence was approved by the convening authority on October 11, 1989.

> the participant voluntarily offers to provide such information. (*See* AR 600-85).

Thus, the sole question we must decide is whether a special agent of the CID *knowingly* approached appellant and got him involved in this transaction in violation of Army regulations. After consideration of the evidence, the military judge found

> [t]hat the CID did not know that the accused was in any sort of rehabilitation program until AFTER he had been targeted as a possible source of the distribution of drugs.

There is ample evidence of record to support the factual findings of the military judge; hence they should not be disturbed on appeal. *United States v. Burris,* 21 MJ 140 (CMA 1985).

Appellant also frames his due-process argument in terms of equity or fundamental fairness, claiming that the adventure presented by the facts of this case corrupts the underlying purposes of the Army drug rehabilitation program. There are two regulations in question: (1) AR 600-85, Personnel—General: Alcohol and Drug Abuse Prevention and Control Program; and (2) AR 195-2, Criminal Investigation: Criminal Investigation Activities. Both regulations contain language prohibiting government agents[5] from "soliciting information" from participants in the ADAPCP. Para 3-7, AR 195-2; *see* para. 2-16*a*, AR 600-85. Both regulations are designed to encourage drug

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[5] Our use of the term "government agent" is generic for the personnel described by the regulations. Both regulations identify USACIDC special agents and other investigative personnel, to include sources" as government agents. Para. 2-5b(5), Criminal Investigation Command Regulation 195-15; *see* para. 2-16*a*, AR 600-85. For purposes of this opinion, both the CID agent and registered source are government agents.

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abusers to come forward and seek help for their problems and offer a great deal of protection to the servicemember who avails himself of the opportunity to overcome drug related problems.

If we were convinced that the CID knowingly sought out a member who was in the program for the purpose of setting him up for a subsequent arrest, then clearly we would have to find that a violation of due process occurred. But that is not the case here.

Many factors lead to this conclusion. First, Powell, the informant, and appellant (during the days of their drug addiction) used drugs, and each would often purchase drugs for the other. Moreover, it is quite obvious that the CID was not using appellant's participation in the drug rehabilitation program to force him to give them information inculpating other drug users. Powell, the informant, was given a free hand to try to catch persons distributing drugs. The record does not support a conclusion that Powell overreached to encourage appellant to do anything that appellant was not already willing to do and had done frequently in the past.

With only a little prompting, appellant agreed to a meeting with Powell and the undercover CID agent; he took the pair to a crack house; he entered the crack house, he negotiated the sale of 11.6 grams of cocaine; he purchased the cocaine along with 18 small ziplock-style plastic bags; and he delivered it to the undercover CID agent. This same sequence of events occurred on December 5, 1988, with 13 grams of cocaine and 26 small ziplock bags being purchased and delivered by appellant. Moreover, driving home after the second transaction, appellant mentioned the possibility of receiving compensation for his services.

It is not the purpose of drug rehabilitation programs to provide a safe harbor for those who continue to engage

freely and voluntarily in subsequent criminal activity.

Entrapment Defense

Appellant also contends that he was lured into the distribution by the government agents when he had no predisposition to do so otherwise. Under RCM 916(g), Manual for Courts-Martial, United States, 1984, "[i]t is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense."

Once an accused raises the defense of entrapment, the Government bears the burden of proving beyond a reasonable doubt that the accused was predisposed to commit the crime and merely needed the opportunity. The resolution of the issue is then left for the factfinder.[6] *United States v. Vanzandt,* 14 MJ 332, 343 (CMA 1982).

Therefore, we must decide whether the Government presented sufficient facts to overcome appellant's entrapment defense. It clearly did. The CID asked an informant to supply names of persons who might be targeted as drug dealers. The informant gave the CID appellant's name. The informant called appellant seeking his help in finding drugs for an unknown third party. Although initially appellant indicated his reluctance to get involved, he nevertheless jumped into the adventure with zeal and success.

The defense was submitted to the court members with proper instructions, and the members rejected it. Panel members, during *voir dire,* were questioned concerning entrapment. Defense counsel's opening statement pre-

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[6] Where the defense is one of denial of due process, the military judge must make the determination. *United States v. Vanzandt,* 14 MJ 332, 343 (CMA 1982). However, this does not apply here because there was reasonable suspicion on the part of the government agents prior to the sting operation taking place.

pared and educated the members on entrapment, and he solicited testimony from witnesses pertaining to whether appellant was entrapped. Defense counsel's closing argument talked of entrapment, and the military judge instructed the members on entrapment. The members were thoroughly versed on the defense of entrapment; from the moment of their selection to the judge's final instructions, they knew of the defense. Our review of the record reveals nothing that would lead this Court to determine that, as a matter of law, the Government failed to meet its burden of proving beyond a reasonable doubt that appellant was not entrapped.

The decision of the United States Army court of Military Review is affirmed.

SULLIVAN, Chief Judge (concurring in the result):

I do not agree with the lead opinion's suggestion that this case can be resolved on the basis of the government agent's lack of knowledge of appellant's status as a patient in a service drug-rehabilitation program. That agent's informant knew appellant was in such a program, and the Government cannot disavow its informant's knowledge. *See Sherman v. United States,* 356 U.S. 369, 375, 78 S.Ct. 819, 822, 2 L.Ed.2d 848 (1958).

In any event, I do not agree with the lead opinion's application of service regulations to this case either. Paragraph 3-7, Army Regulation 192-2 (30 Oct.1985), cited by Judge Cox, does not apply to offenses occurring after entry into the program. Moreover, the prohibited conduct in that section of the Army Regulations is the gathering of information, not the conducting of a "sting" operation.[1] Construed in this light, the criminal investigator committed no regulatory violation.

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[1] Paragraph 2-5b(5), Criminal Investigation Command Regulation 195-15 (1 Nov. 1987) states:

Also, I am not persuaded that any applicable civilian[2] or military regulation[3] on federally assisted drug-treatment

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(5) The Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) prohibitions and restrictions are defined in AR 600-85. USACIDC special agents and other investigative personnel, to include sources, will not solicit information from participants in ADAPCP. Information which is volunteered is acceptable, as long as it is not obtained within an ADAPCP facility or in such a manner as to jeopardize the safety of the source or in a way which compromises the credibility of the ADAPCP. No covert agents will enroll or infiltrate ADAPCP facilities for the purpose of law enforcement activities. The USACIDC special agent must know if their open/confidential/registered source(s) are ADAPCP participants.

[2] According to § 2.17, 42 C.F.R. Ch. 1 (10-1-90 Edition):

§ 2.17 Undercover agents and informants:

(a) *Restrictions on placement.* Except as specifically authorized by a court order granted under § 2.67 of these regulations, no program may knowingly employ, or enroll as a patient, any undercover agent or informant.

(b) *Restriction on use of information. No information obtained by an undercover agent or informant, whether or not that undercover agent or informant is placed in a program pursuant to an authorizing court order, may be used to criminally investigate or prosecute any patient.*

[52 FR 21809, June 9, 1987; 52 FR 42061, Nov. 2, 1987] (Emphasis added.)

[3] Army Regulation (AR) 600-85, Personnel—General: Alcohol and Drug Abuse Prevention and Control Program (21 Oct.1988) provides:

2-16. Law enforcement relationship to the ADAPCP

a. It is Army policy to encourage voluntary entry into the ADAPCP. Military police, Criminal Investigation Division (CID) special agents, and other investigative personnel will not solicit information from client in the program, unless they volunteer to provide information and asistance. If the client volunteers, the information will not be obtained in the CCC [Community Counseling Center] or in such a manner as to jeopardize the safety of sources of the information or com-

programs "proscribes sting operations against drug rehabilitation patients," as the defense contends. Appellant cites no particular statute or regulation for this prohibition, and I have discovered none on my own. The regulations do proscribe placement of informants in these programs, and use of information gathered by informants or undercover agents against the patients of such a program. However, these regulations cannot be reasonably construed to give patients immunity for post-entry drug offenses observed and participated in by government agents or informants.

Finally, appellant was found guilty of wrongfully distributing cocaine on two separate occasions—December 2 and 5, 1988, in violation of Article 112a, Uniform code of Military Justice, 10 USC § 912a. At that time he was receiving out-patient treatment for his cocaine addiction at Fort Myer, Virginia. If the government informant had preyed on appellant's addiction to incude him to commit the crime of *using cocaine,* my judgment would be different in this case. *See generally Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Distribution of drugs ultimately for a stranger for possible profit, however, is an entirely different matter, and a sting opera-

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promise the confidentiality and credibility of the ADAPCP (AR 190-30 and 195-2).

b. Title 42, Code of Federal Regulations, prohibits undercover agents from enrolling in or otherwise infiltrating an alcohol or other drug treatment or rehabilitation program for the purpose of law enforcement activities. This restriction does not preclude the enrollment in the ADAPCP, for rehabilitation purposes, of military police, CID, or other investigative personnel who have an actual alcohol or other drug abuse problem. Their law enforcement status must be made known to the ADCO at the time of their enrollment. These measures are for the protection of the law enforcement client as well as the ADAPCP.

(Emphasis added.)

tion against the same is not patently outrageous government conduct. *See United States v. Luttrell,* 889 F.2d 806, 811-14 (9th Cir.1989).

EVERETT, Senior Judge (dissenting):

Judge Cox states that "the sole question we must decide is whether a special agent of the CID *knowingly* approached appellant and got him involved in this transaction in violation of Army regulations." In response to this question, he recites a finding by the military judge "[t]hat the CID did not know that the accused was in any sort of rehabilitation program until AFTER he had been targeted as a possible source of the distribution of drugs." Concluding that "[t]here is ample evidence of record to support [this] factual finding[] of the military judge," Judge Cox impliedly answers the question, "No." 33 MJ at 358.

The lead opinion errs, however, by phrasing the question too narrowly and, consequently, errs as well in its answer.

I

In the view of many, illegal drugs is the single most serious law-enforcement problem facing governments at all levels today. Drug abuse is a killer: It kills bodies; it kills spirit; it kills imagination; it kills love. It is not hyperbolic to call the drug epidemic in this country a human and social tragedy. Appellant's personal downfall, summarized in footnote 3 of the lead opinion, is all too common.

Law-enforcement efforts, however, are not enough, alone, to remedy this sickness. We cannot—and we do not—give up on the lives and souls of those whose addictions own them; we can—and we do—put huge efforts into helping the helpless regain control of their own destinies. This not only is the morally right thing to do, but also it is socially beneficial.

Rehabilitation of a drug addict is extremely difficult.

The physical and psychological torment that the addict experiences is a personal hell that, I am confident, cannot be fully appreciated by anyone who has not suffered the experience. It is, as well, a fragile process—one that is not without inherent steps backward and one that easily can be frustrated by outside influences.

To help remove some extraneous factors that might make rehabilitation all but impossible, Congress mandated confidentiality with respect to patients' participation in any federally assisted drug-treatment program. *See* 42 USC § 290ee-3(a). This confidentiality extends even to generally proscribing use of records of program patients "to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient." 42 USC § 290ee-3(c). It is thus clear that, in the conflict that sometimes arises between law-enforcement and genuine rehabilitation efforts, Congress conceptually has protected the latter even at the limited expense of the former.

Following this lead, the Army has imposed reasonable self-restraint on its law-enforcement activities in order to protect the hoped-for success of its rehabilitation effort under the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP). For instance, paragraph 2-16a of Army Regulation (AR) 600-85, Personnel—General: Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 88), states:

> It is Army policy to encourage voluntary entry into the ADAPCP. Military police, Criminal Investigation Division [sic] (CID) special agents, and other investigative personnel will not solicit information from clients in the program, unless they volunteer to provide information and assistance.

Also, paragraph 2-16*b* of this same regulation recognizes:

> Title 42, Code of Federal Regulations, prohibits

> undercover agents from enrolling in or otherwise infiltrating an alcohol or other drug treatment or rehabilitation program for the purpose of law enforcement activities.

See n. 2 of the Chief Judge's separate opinion.

In the same vein, paragraph 3-7, AR 195-2, Criminal Investigation: Criminal Investigation Activities (30 Oct. 85), charges:

> In compliance with the Army's ADAPCP policy, CID will investigate participants in ADAPCP for controlled substance offenses only if the offense occurred after entry into the program or if the participant has been identified as a suspect or subject prior to the time of entry into the program. Participants in ADAPCP will not be knowingly approached by CID special agents for the purpose of soliticing information about controlled substances distribution unless the participant voluntarily offers to provide such information.

Even more pointedly, paragraph 2-5b(5), CID Regulation 195-15, Criminal Investigation: USACIDC Source Program (1 Nov. 1987), asserts:

> The Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) prohibitions and restrictions are defined in AR 600-85. USACIDC special agents and other investigative personnel, to include sources, will not solicit information from participants in ADAPCP. Information which is volunteered is acceptable, as long as it is not obtained within an ADAPCP facility or in such a manner as to jeopardize the safety of the source or in a way which compromises the credibility of the ADAPCP.

II

This regulatory approach toward safeguarding the integrity of ADAPCP may fairly be summarized as follows: If an ADAPCP patient has been identified as a drug suspect prior to his entry into the program, the investigation may continue; additionally, law-enforcement efforts may be pursued to investigate any suspicion of illegal drug activity that occurs after the patient is enrolled in the program. As the lead opinion puts it, "It is not the purpose of drug rehabilitation programs to provide a safe harbor for those who continue to engage freely and voluntarily in subsequent criminal activity." 33 MJ at 358.

Other than these caveats, however, ADAPCP participants are to be left alone, free from any government contacts that might well frustrate the successful rehabilitation of the patient. Any action that might psychologically lure a flawed and vulnerable addict back into the environment he is trying so mightily to shun is morally reprehensible and legally proscribed.

In my view, that is what happened here. To clear up a perceived drug problem in the very office building that housed the headquarters of the Army's Criminal Investigation Command, CID agents approached Powell and offered him assistance in a variety of ways; in return, Powell was to furnish the agents the names of five people in the building who were "dealing drugs." Powell submitted appellant's name as one of the five.

Appellant came to Powell's mind because the two of them had, in the past, used cocaine together. Powell candidly admitted at trial, however, that he had no knowledge at all that appellant ever had sold drugs. When asked why he had said appellant was a seller when that was not true, he answered:

A. Because of the position I was in.

> Q [DC]: What position were you in?
> A: I was trying to, I guess, run away from my problems and get [back] in the Army, but I had these charges hanging over my head that they [the CID agents] said they could get rid of. They told me that if I produced some names and helped them get, I think it was, they came up—they said like five people, then they would squash the charges. So I was coming up with some names.

Not only did Powell know, at least to the extent of their relationship, that appellant was not a drug dealer, but Powell also knew that appellant was in a drug rehabilitation program—and he knew it in the first moments of his initial telephone conversation with appellant. While Agent Duperron, Powell's contact, could not "recall" whether Powell had told him early on about appellant's rehabilitation participation, he acknowledged that Powell "could have" told him that.

In any event, the record makes clear that Powell, acting as a source and informant for the CID, falsely identified appellant to the CID as a drug dealer, knowing of appellant's participation in a drug rehabilitation program. Additionally, Powell may even have told Agent Duperron of this participation. Thereafter, Powell made contact with appellant, while the latter was in the program, urging him to do something that, so far as Powell knew, appellant never had done before: distribute drugs.

Assuming, for present purposes, that Powell did not tell his handler, Agent Duperron, about appellant's program participation, the Government cannot escape the taint associated with Powell's own knowledge of this participation. "The Government cannot make such use of an informer and then claim disassociation through ignorance." *Sherman v. United States,* 356 U.S. 369, 375, 78 S.Ct. 819, 822, 2 L.Ed.2d 848 (1958). *See* para. 1-2d, CID Reg. 195-

15 ("Registered sources are always considered agents of the Government.").

It is this last point that is the flaw both in the military judge's finding and in the lead opinion. In looking to see what the CID did or did not know, the military judge failed to consider Powell as *part* of the CID for this purpose; in my view and based on the authority just cited above, he erred in that regard. Similarly, in limiting the "sole question" to 'whether a special agent of the CID . . . approached appellant" while having the knowledge that appellant was a participant in a drug rehabilitation program, Judge Cox inappropriately excludes Powell—an informant and registered source—from the scope of his inquiry.

As the lead opinion quite aptly states, "Powell, the informant, was given a free hand to try to catch persons distributing drugs." 33 MJ at 358. Obviously, he had *too* free a hand! The Government cannot turn loose a desperate drug addict as an informant and then later seek to shield itself from responsibility for his actions and his knowledge.

The fact of the matter is that, in contravention of both the spirit and the letter of the drug-rehabilitation-program concept and in contravention of Army-wide and CID regulations, appellant was approached by the CID while he was a rehabilitation patient and lured back into the drug environment that he had spent countless hours trying to shirk and that the government had spent countless hours and dollars helping him shirk. This was unlawful and immoral, to say nothing of plain stupid.

Accordingly, I dissent.

APPENDIX C

U.S. STATES ARMY COURT OF MILITARY REVIEW

ACMR 8902034

UNITED STATES, APPELLEE,

v.

SERGEANT FIRST CLASS, SIDNEY P. COOPER, 216-62-1492,
U.S. ARMY, APPELLANT

U.S. Army Military District of Washington

H. C. Eggers, Military Judge

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5 November 1990

DECISION

For Appellant: Lieutenant Colonel Russell S. Estey, JAGC, Captain Brian D. Bailey, JAGC (on brief).

For Appellee: Colonel Alfred F. Arquilla, JAGC, Lieutenant Colonel Daniel J. Dell'Orto, JAGC, Captain Timothy J. Saviano, JAGC (on brief).

Per Curiam:

On consideration of the entire record, including consideration of the issues personally raised by the appellant, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are affirmed.

FOR THE COURT:

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

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